No. 87-1201-CFX
Status: GRANTED

Title: Myles Osterneck and Guy-Kenneth Osterneck, etc., Petitioners
v.
Ernst & Whinney

Docketed:
January 15, 1988

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Webb Jr.,Paul

Counsel for respondent: Garrett Jr.,Gordon Lee

Entry	Date	Note	Proceedings and Orders
1	Jan 15 1988	G	Petition for writ of certiorari filed.
2	Feb 18 1988		Brief of respondent in opposition filed.
3	Feb 24 1988		DISTRIBUTED. March 18, 1988
4	Apr 11 1988		Supplemental brief of petitioners Myles Osterneck, et al. filed.
5	May 11 1988		Supplemental brief of respondent Ernst & Whinney filed.
6	May 23 1988		REDISTRIBUTED. May 26, 1988
7	May 27 1988		REDISTRIBUTED. June 2, 1988
8	Jun 6 1988		Petition GRANTED.
			**********
9	Jul 21 1988		Brief of petitioners Myles Osterneck, et al. filed.
10	Jul 21 1988		Joint appendix filed.
11	Aug 29 1988		Brief of respondent Ernst & Whinney filed.
12	Sep 13 1988		CIRCULATED.
13	Sep 19 1988	X	Reply brief of petitioners Myles Osterneck, et al. filed.
14	Oct 4 1988		Record filed.
		*	Certified original record & proceedings, boxes 3 & 9 received. 11 other boxes received on Oct. 5, 1988.
15	Oct 20 1988		Set for argument. Tuesday, November 29, 1988. (2nd case) (1 hr.)
16	Nov 29 1988		ARGUED.

87-1201

No. .....

In The
Supreme Court of the United States
October Term, 1987

MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,

Plaintiffs-Petitioners,

v.

ERNST & WHINNEY,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Did the Petitioners' request for discretionary pre-judgment interest, which was made after a decision on the merits of their securities fraud claims, constitute a motion under Rule 59(e) of the Federal Rules of Civil Procedure which rendered their notice of appeal untimely pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure?

PARTIES

The following persons and entities were parties to the proceeding in the Court of Appeals: Myles Osterneck, Guy-Kenneth Osterneck, Myles and Guy-Kenneth Osterneck as Trustees for the Benefit of Robert Osterneck (Plaintiffs-Appellants); E.T. Barwick Industries, Inc., M.E. Kellar, B.A. Talley (Defendants-Cross Appellants); Eugene Barwick, Ernst & Whinney (Defendants-Appellees).

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OPINIONS BELOW

The Court of Appeals' opinion sought to be reviewed, which is reported at 825 F.2d 1521, and additional orders of the Court of Appeals, which are not reported, appear in the Appendix. The Judgment entered on the merits in the District Court, the District Court's order deferring consideration of Petitioners' motion for prejudgment interest until after entry of judgment on the merits, the District Court's order granting prejudgment interest and the judgment adding prejudgment interest also appear in the Appendix, along with other relevant materials from the records in the courts below.

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JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Eleventh Circuit was entered on August 31, 1987. The Eleventh Circuit denied Petitioners' Suggestion of Rehearing In Banc and Petition for Rehearing on October 19, 1987. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

o

FEDERAL RULES INVOLVED

Rule 59(e) of the Federal Rules of Civil Procedure:

"*Motion to alter or amend a judgment.*

A motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment."

Rule 4(a)(4) of the Federal Rules of Appellate Procedure:

"*Appeals in civil cases.*

. . .

4) If a timely motion under the Federal Rules of Civil Procedure is filed in the District Court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing."

———o———

STATEMENT OF THE CASE

This case arises out of the 1969 merger of Cavalier Bag Co. with E.T. Barwick Industries, Inc. Petitioners Myles Osterneck, et al. ("the Osternecks"), who owned Cavalier Bag Co. until that time, exchanged their stock in Cavalier for Barwick Industries stock. Sometime later the Osternecks became aware that the audited financial statements of Barwick Industries for the fiscal years 1968 through 1975 vastly overstated the financial condition of Barwick Industries. The Osternecks had relied on these financial statements and other representations in deciding to approve the merger and in deciding to purchase and

retain additional stock in Barwick Industries after the merger.

On September 4, 1975 the Osternecks filed this action alleging violations of §§ 10(b) and 20 of the Securities Act of 1934 (15 U.S.C. §§ 78j(b), 78t), Rule 10(b)(5) thereunder (17 C.F.R. § 240 10b-5) and the common law of Georgia. In addition to Barwick Industries and several other individuals and organizations, the accounting firm of Ernst & Whinney ("E & W") was named as a defendant. E & W had not only prepared the inflated financial statements, but also had actively participated in the merger and had received a substantial fee from the Osternecks pursuant to the merger agreement. The Osternecks' claims against E & W were based on negligence as well as securities fraud.

Although the Osternecks' negligence claims against E & W were dismissed, apparently on the ground that no privity existed between E & W and the Osternecks, the Osternecks' securities fraud claims were tried before a jury almost ten years after the complaint was filed. After three and one-half months of trial, the jury returned a verdict against Barwick Industries and two individual defendants on the merits of the Osternecks' securities fraud claims. A verdict was returned in favor of E & W, however.

Immediately after the verdict was announced, the Osternecks orally requested that prejudgment interest be included in the judgment. The District Court held, however, that the question of prejudgment interest must be handled "separately" from the judgment on the merits and deferred ruling on the issue. Judgment was entered

on the jury verdict later the same day, January 30, 1985. Several days later, the Osternecks filed in writing their request for discretionary prejudgment interest on the amount awarded by the jury on the merits of their securities fraud claims. In addition, believing that the District Court erred in dismissing their negligence claims against E & W and in its rulings on certain evidentiary questions and jury charges, the Osternecks filed a notice of appeal on March 1, 1985.

In July 1985, the District Court granted the Osternecks' motion for prejudgment interest and entered an "Amended Judgment" directing that prejudgment interest be "added" to the earlier judgment. Although styled "Amended Judgment," the July 1985 judgment did not reconsider the merits or correct any errors in the January 30, 1985 judgment. To the contrary, the July 1985 order expressly provided that the January judgment would "remain the same" in every respect other than the addition of prejudgment interest to the amount awarded by the jury on the merits of the federal securities claim. *Id.*

Almost two months later, the Clerk of the Eleventh Circuit raised a question as to whether the Osternecks' motion for prejudgment interest should be considered a Rule 59(e) motion to alter or amend the judgment which would render the Osternecks' March 1, 1985 notice of appeal invalid. Prior to this time, no one involved in this case had ever considered the Osternecks' motion for prejudgment interest to be a Rule 59(e) motion which would invalidate all prior notices of appeal. For example, several parties to the appeal had stipulated in writing that the Osternecks' March 15, 1985 notice of cross appeal was

timely. The Clerk of the District Court had required the Osternecks to pay an additional filing fee for their notice of cross appeal filed after the District Court's award of prejudgment interest in July 1985 notwithstanding the provision in F.R.App.P. 4(a)(4) which provides that such an additional filing fee is not required when a new notice of appeal is filed after an order entered on a Rule 59(e) motion. E & W had filed its notice of appeal from the award of costs on the January 30 judgment in June 1985 and failed to renew the notice after the order awarding prejudgment interest as would have been required if the Osternecks' motion for prejudgment interest were a Rule 59(e) motion. The District Judge had treated the January 30, 1985 judgment as the *final* judgment notwithstanding the pending motion of a prejudgment interest when in May 1985 it denied as untimely E.T. Barwick's motion for an extension of time to file its bill of costs. Indeed, even in granting the motion for prejudgment interest, the District Judge continued to refer to the January 30, 1985 judgment as the "final" judgment.

The Osternecks filed a brief in the Eleventh Circuit on September 19, 1985 on the jurisdictional question. In an order dated October 30, 1985, the Eleventh Circuit held that "the jurisdictional issues are carried with the case." On August 31, 1987 the Court of Appeals held that a post judgment motion for discretionary prejudgment interest is a Rule 59(e) motion and dismissed the Osternecks' appeal as untimely pursuant to F.R.App.P. 4(a). Prior to its August 31, 1987 decision, the Eleventh Circuit had never before held that a motion for prejudgment interest constituted a Rule 59(e) motion.

———o———

EXISTENCE OF JURISDICTION BELOW

The District Court had federal jurisdiction pursuant to 28 U.S.C. § 1331 as a result of the questions of federal law presented by the Osternecks' claims under the Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) and under Rule 10(b)(5) (17 C.F.R. § 240.10b-5).

———o———

REASONS FOR GRANTING THE WRIT

The Supreme Court should grant certiorari in this case because the opinion of the Eleventh Circuit conflicts with the decisions of this Court and other Courts of Appeals regarding the scope of Rule 59(e), the nature of prejudgment interest and the nullification of notices of appeal.

Rule 59(e) of the Federal Rules of Civil Procedure provides:

> "*Motion to alter or amend a judgment.*
>
> A motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment."

A proper determination of whether a motion is a Rule 59(e) motion is imperative to the preservation of rights in the District Courts and Courts of Appeals. If a motion is considered a Rule 59(e) motion, it must be filed in District Court within ten days after the judgment. Moreover, if a motion is considered a Rule 59(e) motion, any notices of appeal filed while it is pending are ineffective under F.R. App.P. 4(a)(4)(iii).

Although seemingly a simple rule, Rule 59(e) has long caused great confusion and conflict in the Courts of Appeals. In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), the Supreme Court granted *certiorari* to resolve the conflict regarding the scope of Rule 59(e) in a case involving a motion for attorney's fees under 42 U.S.C. § 1988. Finding that Rule 59(e) is invoked "only to support reconsideration of matters encompassed in a decision on the merits," not to the initial granting of relief which is "collateral to the main cause of action," the Court held that a motion for attorney's fees pursuant to § 1988 does not constitute a Rule 59(e) motion. Significantly, in *White* the Supreme Court did not limit its inquiry to the history or nature of motions for attorney's fees. Rather, the Court dealt with the question by reviewing the purpose and scope of Rule 59(e) in general. Thus, the Supreme Court made it clear that Rule 59(e) does not apply to motions seeking relief which require "an inquiry that cannot commence until one party has 'prevailed.'" *Id.* at 451-452.

Despite the Supreme Court's clarification of Rule 59(e) in *White*, the Courts of Appeals have continued to divide over the proper application of Rule 59(e). For example, in *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 737 (9th Cir. 1986), cert. den'd. — U.S. —, 107 S.Ct. 324 (1986), the Ninth Circuit followed *White* to hold that a post judgment motion for discretionary prejudgment interest is *not* covered by Rule 59(e). The Eleventh Circuit in the present case, however, followed several decisions from other circuits which blindly relied on *pre-White* cases to hold that a post judgment motion for discretionary prejudgment interest *is* a Rule 59(e) motion. Thus, the Eleventh Cir-

cuit's opinion in the present case squarely conflicts with the Ninth Circuit's opinion in *Jenkins v. Whittaker Corp.*

Indeed, as demonstrated by the Ninth Circuit in *Jenkins*, the Eleventh Circuit opinion in the present case directly conflicts with the *White* definition of a Rule 59(e) motion:

> "Rule 59(e) was intended to deal with the correction of error, not the initial granting of relief." *See* 6A J. Moore, J. Lucas, and G. Grotheer, Moore's Federal Practice, Paragraph 59.03 2d.Ed. (1985). The Supreme Court described this role in *White v. New Hampshire Department of Employment Security*, . . . :
>
> > '[Rule 59(e)'s] draftsmen had a clear and narrow aim. According to the accompanying advisory committee report, the rule was adopted to 'make clear that the district court possesses the power' to *rectify its own mistakes* in the period immediately following the entry of judgment . . . Consistent with this original understanding, the federal courts generally have invoked Rule 59(e) only to support *reconsideration of matters properly encompassed in a decision on the merits* . . . By contrast, a request for attorney's fees under [42 U.S.C.] § 1988 raises legal issues *collateral to the main cause of action*—issues to which Rule 59(e) was never intended to apply.
> >
> > Section 1988 provides for awards of attorney's fees only to a 'prevailing party.' Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require *an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has prevailed.*' . . .
>
> . . . [A] prejudgment interest motion does not ask the court to reconsider or correct its own mistakes,

> because the court has not previously considered or decided the issue. The motion addresses an issue collateral to the main cause of action, requiring an inquiry unrelated to the merits that cannot be made until the moving party has 'prevailed' on the merits. Prejudgment interest compensates not for the *injury* giving rise to the action but for the *delay* between in jury and judgment. [cit.]. Both attorney's fees and prejudgment interest seek what is due because of the judgment, the former in terms of money expended, the latter in terms of time."

Jenkins, supra at 736-37, *quoting White, supra*, 455 U.S. at 450, 451 (emphasis original).

The Eleventh Circuit opinion in the present case also directly conflicts with holdings of this Court and other Courts of Appeals on discretionary prejudgment interest. In the present case, the Eleventh Circuit characterized discretionary prejudgment interest as a "substantive" right which is not collateral to the main cause of action. *Osterneck v. E.T. Barwick Industries*, 825 F.2d at 1525-26. The Supreme Court and other Courts of Appeals, however, have repeatedly held that discretionary prejudgment interest does not form the basis or substance of the main cause of action, but is only incidental thereto. *Eg. Stewart v. Barnes*, 153 U.S. 456, 462 (1894); *Girard Trust Co. v. United States*, 270 U.S. 163, 168 (1925); *Railroad Credit Corp. v. Hawkins*, 80 F.2d 818, 826 (4th Cir. 1936); *New York Trust Co. v. Detroit T & I Ry.*, 251 F.514 (6th Cir. 1918). Although these cases use the word "incidental" to describe discretionary prejudgment interest, "incidental" and "collateral" have frequently been used interchangeably in discussing whether a motion falls within Rule 59(e) under the *White* analysis. *See West v. Keve*, 721 F.2d 91,

95 (3rd Cir. 1983); *Bygott v. Leaseway Transport Co.*, 637 F.Supp. 1433, 1438 (E.D. Pa. 1986). *See also Swanson v. American Consumer Ind., Inc.*, 517 F.2d 555, 561 (7th Cir. 1975) (motion for attorneys fees was "incidental" to the main cause of action). The Eleventh Circuit's characterization of discretionary prejudgment interest as a substantive claim which is not collateral to the main cause of action, therefore, conflicts with the decisions of this Court and other federal courts which have long held that discretionary prejudgment interest is not a substantive right, but is only incidental, or collateral, to the main cause of action.

In addition to conflicting with the above cases, the Eleventh Circuit's approach to Rule 59(e) conflicts with that recently adopted by the Fifth Circuit in *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665 (5th Cir. 1986) (en banc). In *Harcon Barge* the Fifth Circuit adopted a "bright line" test for determining whether a motion falls within the scope of Rule 59(e). Under the Fifth Circuit's "bright line" test, *any* motion *served* within ten days after the entry of the judgment will be treated as a Rule 59(e) motion regardless of whether the motion raises an issue collateral to the merits of the main cause of action. *Harcon Barge, supra,* at 667. Although urged by E & W to adopt the Fifth Circuit's "bright line" test, the Eleventh Circuit in the present case expressly declined to follow the Fifth Circuit approach. *Osterneck, supra,* at 1527, n.9. *See also C.I.T. v. Nelson,* 743 F.2d 774, 775 n.1 (11th Cir. 1984) (rejecting a similar bright line test because it conflicts with *White*).

As a result of the different approaches to Rule 59(e) now taken by the Fifth and Eleventh Circuits, the same

motion which is treated as a Rule 59(e) motion in one circuit is not treated as a Rule 59(e) motion in the other. For example, in *Harcon Barge, supra,* the Fifth Circuit held that a motion respecting costs which is filed and served within ten days after the entry of judgment *is* a Rule 59(e) motion. In the Eleventh Circuit, however, a motion respecting costs which is filed and served within ten days after judgment is *not* a Rule 59(e) motion. *Lucas v. Florida Power & Light Company,* 729 F.2d 1300 (11th Cir. 1984).

As shown by the Eleventh Circuit opinion in the present case, by the Ninth Circuit opinion in *Jenkins,* and by the Fifth Circuit opinion in *Harcon Barge,* there is a growing division among the Courts of Appeals regarding the proper application of Rule 59(e). All three of these decisions were rendered within the last two years, yet each decision conflicts with the other two. Accordingly, the Supreme Court should grant *certiorari* in this case to end the growing confusion and conflict among the federal Courts of Appeals on this issue. *See also Whittaker Corp. v. Jenkins,* — U.S. —, 107 S.Ct. 324 (1986) (dissenting op.) (even before the added conflict resulting from *Harcon Barge* and the present case, two Justices announced that the conflict among the circuits regarding the scope of Rule 59(e) should be resolved).

Moreover, the Supreme Court should review and reverse the Eleventh Circuit opinion in this case because the Eleventh Circuit opinion conflicts with this Court's holding in *Thompson v. Immigration and Naturalization Service,* 375 U.S. 384 (1964). *Thompson,* held that an appeal should not be dismissed as untimely where the appellant

relied on the statements of the District Court and the other parties in determining when to file its notice of appeal. Like the appellants in *Thompson*, the Osternecks relied on the statements and actions of the District Court and the other parties in determining when to file their notice of appeal. For example, the Osternecks' determination that the January 30, 1985 judgment was the final judgment on the merits for purposes of filing a notice of appeal was the result of the District Court's repeated characterization of the January 30, 1985 judgment as the *final* judgment notwithstanding the pendency of the motion for prejudgment interest, [App. 6-7, App. 13] and of the District Court's characterization of the motion for prejudgment interest as an issue "separate" from the judgment on the merits which was entered on January 31, 1985. [App. 2, 3]. The Osternecks' failure to treat their motion for prejudgment interest as a Rule 59(e) motion or to renew their March 1, 1985 notice of appeal was also based on the reassurance from the other parties that their March 15, 1985 notice of cross-appeal was timely [App. 50-51], on the fact that the clerk of the district court charged an additional filing fee for the notice of cross-appeal from the order granting prejudgment interest, an action which was incompatible with a characterization of the Osternecks' motion as a Rule 59(e) motion, and on the fact that no other party, even E & W, considered the Osternecks' motion to be a Rule 59(e) motion which would render all earlier notices of appeal ineffective. *See Osterneck, supra,* 825 F.2d at 1527, 1530. Indeed, until it rendered its opinion in the present case, the Eleventh Circuit had repeatedly indicated that a motion which, like a motion for discretionary prejudgment interest, merely seeks collateral relief

which is due because of a decision on the merits does *not* constitute a Rule 59(e) motion. *See Arceneaux v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 767 F.2d 1498 (11th Cir. 1985) (after discussing *White* with regard to a motion for attorneys fees, court affirmed discretionary award of prejudgment interest on a securities fraud claim pursuant to a motion which was not filed in compliance with Rule 59(e)); *Alimenta (U.S.A.), Inc. v. Anheuser-Busch Companies,* 803 F.2d 1160 (11th Cir. 1986) ("Rule 59(e) applies to motions for reconsideration of matters encompassed in a decision on the merits").

Because the present case involves unique circumstances similar to those in the *Thompson* case, the Eleventh Circuit erred in dismissing the Osternecks' appeal as untimely. Accordingly, this Court should grant *certiorari* in this case to correct this error and to promote the uniform application of the *Thompson* decision.

———o———

CONCLUSION

This Court should grant *certiorari* to resolve the growing conflict among the circuits with regard to the scope of Rule 59(e), and to protect the crucial rights of appeal for litigants, such as the Osternecks, who must file a notice of appeal in a jurisdiction which has not yet either adopted the "bright line" rule of the Fifth Circuit or characterized every type of possible post judgment motion as being either within or beyond the scope of Rule 59(e).

Respectively submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-8165, 85-8523 & 85-8593

MYLES OSTERNECK, et al.,	Plaintiffs-Appellants, Cross-Appellees,
versus	
E.T. BARWICK INDUSTRIES,	Defendant-Appellee, Cross-Appellant,
E.T. BARWICK,	Defendant,
M.E. KELLAR,	Defendant-Appellee, Cross-Appellant,
BUFORD TALLEY,	Defendant-Appellee, Cross-Appellant,
ERNST & WHINNEY,	Defendant-Appellee, Cross-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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(Filed Oct. 30, 1985)

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

The jurisdictional questions are carried with the cases.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION
	)	
E. T. BARWICK INDUSTRIES, ET AL.,	)	NO. C75-1728A
	)	
Defendants.	)	

- VOLUME 54 -

Transcript of proceedings before The Honorable Horace T. Ward, United States District Judge, and a jury, at Atlanta, Fulton County, Georgia, commencing on October 16, 1984.

• • •

(Discussion in Open Court on January 30, 1985)

The Court: There's another matter that has to be brought to the court on this issue, that is, prejudgment interest on this particular verdict, but I am going to have to handle that separately and have it argued to me.

All right, we'll stand in recess, and just on that one point as to whether a mini-trial or resubmission of the matter to the jury on whether they would find that the issue was barred by a two-year statute of limitations. It will be one question if it's submitted.

You discuss it among yourselves and come back to my office and I will decide when I'm going to hear the prejudgment interest arguments.

We'll stand in recess for ten minutes.

[A short recess was had.]

The Court: All right. I will hear the motion concerning prejudgment interest. I know it's going to be offered from the plaintiffs. Just state on the record that you are going to move for prejudgment interest.

Mr. Webb: Yes, Your Honor, we are. We do move for prejudgment interest in favor of the plaintiffs against the defendants against whom the verdicts were returned.

The Court: In view of the fact that I do not wish to have it argued right now and based on the request of the lawyers, I will allow it to be submitted in writing.

The plaintiffs will have ten days to present to the judge the plaintiffs' position on prejudgment interest and the affected defendants will have ten days thereafter, after they receive a copy of the brief and submission of the plaintiffs, to respond and then the judge will rule on it.

The judge will direct the clerk to issue a judgment on the verdict and I don't think—I think it can be done without having to have the lawyers submit proposed judgments. Sometimes you have to do that, but I think it can be figured out, Ms. Daniels. If you need any assistance you can talk to the judge.

The judgment will be entered on this particular verdict as soon as possible, then if prejudgment interest is granted it will be—the judgment can be amended.

• • •

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, GUY-KENNETH OSTERNECK, ROBERT OSTERNECK, MYLES OSTERNECK and GUY-KENNETH OSTERNECK AS TRUSTEES FOR THE BENEFIT OF ROBERT OSTERNECK,

Plaintiffs

CIVIL ACTION

NO. C75-1728A

VS

E. T. BARWICK INDUSTRIES, INC., E. T. BARWICK, M. E. KELLAR, B. A. TALLEY AND ERNST & WHINNEY

Defendants

JUDGMENT

This action came before the Court and a jury, Honorable Horace T. Ward, U. S. District Judge, presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the plaintiffs and against the defendants E. T. BARWICK INDUSTRIES, INC., M. E. KELLAR and B. A. TALLEY on the Federal Securities Claim and the State Common Law Claim in the amount of TWO MILLION, SIX HUNDRED THIRTY-TWO THOUSAND, TWO HUNDRED THIRTY-FOUR & 00/100 dollars. ($2,632,234.00) as compensatory damages, with interest thereon at the rate of 9.09% as provided by law, and their costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered in favor of defendant E. T. BARWICK and against the plaintiffs on the Federal Securities Claim and the State Common Law Claim and that the defendant E. T. BARWICK recover of the plaintiffs his costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered in favor of the defendant ERNST & WHINNEY and against the plaintiffs on the Federal Securities Claim and that defendant ERNST & WHINNEY recover of the plaintiffs its costs of action.

Dated at Atlanta, Georgia, this 30th day of January, 1985.

FILED & ENTERED IN CLERK'S OFFICE
THIS 30TH DAY OF JANUARY, 1985
BEN H. CARTER, CLERK

By: Patsy L. Daniels
Deputy Clerk

BEN H. CARTER, CLERK
/s/ Patsy L. Daniels
Patsy L. Daniels
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al., Plaintiffs	)	CIVIL ACTION
vs.	)	FILE NO. C75-1728A
E.T. BARWICK INDUSTRIES, INC., et al., Defendants	)	

ORDER OF COURT

(Filed May 1, 1985)

On January 30, 1985, a judgment was entered in favor of defendant E. T. Barwick. On March 25, 1985, defendant Barwick filed a motion for extension of time to file his bill of costs. Barwick requests that the court extend the time for filing his bill of costs up to and including May 1, 1985.

Plaintiffs oppose said motion. Plaintiffs point out that Local Rule 255-7 provides:

> A bill of costs must be filed by the prevailing party within 30 days after the entry of judgment. A bill of costs which is not timely filed will result in costs not being taxed as a part of the judgment.

Local rules of practice, such as Rule 255-7, "have the force and effect of law, and are binding upon the parties and the court which promulgated them until they are changed in the appropriate manner." *Woods Construction Co., Inc. v. Atlas Chemical Industries, Inc.*, 337 F.2d 888, 890 (10th Cir. 1964) (citations omitted).

Defendant Barwick's motion was filed 24 days after the date on which the bill of costs "must" have been filed. Additionally, Barwick did not seek an extension of time for compliance with Rule 255-7 until well after the date upon which the bill of costs was to have been filed. There is no doubt that Barwick failed to comply with the requirements of Local Rule 255-7. The time period established by Local Rule 255-7 is designed to provide a time limit for the conclusion of litigation in the trial court, is necessary for the orderly administration of cases, and is binding upon the parties. *In re Pin Oaks Apartments, Alleged Partnership*, 14 B.R. 16, 17 (S.D.Tex. 1981); *Woods Construction Co., Inc.*, 337 F.2d at 891. *Compare J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 102 F.R.D. 73, 77 (E.D.La. 1984) (untimely bill of costs permitted where case "not governed by any local rule").

Accordingly, defendant E. T. Barwick's motion for extension of time to file his bill of costs is hereby DENIED.[1]

SO ORDERED, this 29th day of April, 1986.

/s/ Horace T. Ward
HORACE T. WARD
UNITED STATES DISTRICT
JUDGE

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[1] Plaintiffs were granted an extension of time to file their bill of costs in this action. However, said extension was granted pursuant to a consent motion and order which was filed prior to the expiration of the thirty-day limit set forth in Rule 255-7. Both of these facts distinguish the court's ruling with respect to plaintiffs' motion from the court's ruling as set forth hereinabove.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al., Plaintiffs	)	CIVIL ACTION
vs.	)	
E.T. BARWICK INDUSTRIES INC., et al., Defendants.	)	FILE NO. C75-1728A

ORDER OF COURT

(Filed July 1, 1985)

On January 30, 1985, a judgment in the amount of $2,632,234.00 was entered in favor of the plaintiffs and against defendants E. T. Barwick Industries, Inc., M. E. Kellar, and B. A. Talley on federal securities law claims and state common law claims. At that time the plaintiffs requested that the court add prejudgment interest to that amount. The court deferred ruling on the matter of prejudgment interest and directed the parties to brief the issue. The parties have briefed the issue of prejudgment interest, and the court is now prepared to issue its ruling on plaintiffs' motion for award of prejudgment interest.

Defendants oppose plaintiffs' request for prejudgment interest, and in the alternative, argue that if it is allowed, any amount awarded should be less than the amount claimed by the plaintiff. Defendants further argue that whether prejudgment interest should be awarded should be determined by reference to Georgia law. It is

clear that "[i]n determining whether prejudgment interest is allowed on damages pursuant to Rule 10b-5, federal law governs." *Wolf v. Frank*, 477 F.2d 467, 479 (5th Cir.), *reh'g denied*, 478 F.2d 1403, *cert. denied*, 414 U.S. 975, *reh'g denied*, 414 U.S. 1104 (1973). *See also Alley v. Miramon*, 614 F.2d 1372, 1381 n.18 (5th Cir. 1980); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 560 (5th Cir. 1981), *aff'd in part and rev'd in part on other grounds*, 103 S.Ct. 683 (1983); *Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith*, 595 F. Supp. 171, 172 (M.D.Fla. 1984). It is also clear that "whether prejudgment interest should be awarded on a damage recovery in a Rule 10b-5 action is a question of fairness resting within the District Court's sound discretion." *Wolf v. Frank*, 477 F.2d at 479.[1] Defendants' reliance on *United States ex rel. Georgia Electrical Supply v. U.S. Fidelity & Guaranty Co.*, 656 F.2d 993 (5th Cir. 1981), and other cases which suggest that state law (and the interest-on-liquidated-damages-only rule) provides the standard by which prejudgment interest should be awarded, is misplaced as those cases did not arise in the context of federal securities law violations but involved other federal statutes and causes of action thereunder.

Plaintiffs contend that the interest should be calculated for the period September 8, 1969 to January 30, 1985 (date of merger to date of judgment). The plaintiffs have suggested ten alternative rates at which prejudgment in-

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[1] As to the state law claims, however, Georgia law governs. *George R. Hall, Inc. v. Superior Trucking Company, Inc.*, 532 F. Supp. 985, 998 (N.D.Ga. 1982). In the instant case, involving unliquidated damages, prejudgment interest on a state law claim is precluded by Georgia law. *See* O.C.G.A. § 51-12-14.

terest might be calculated. This is a matter about which there has been considerable discussion. "Most cases do not explain the reason for use of a particular interest rate, but merely adopt the state interest rate without further discussion." Jacobs, *The Measure of Damages in Rule 10b-5 Cases,* 65 Georgetown L.Rev. 1093, 1161 (1977). Further, the cases show a wide range in the amount of interest awarded. *Id.* at 1161 n. 369. The alternative interest rates presented by the plaintiffs would result in prejudgment interest calculations ranging from a low of $2,836,536.63 (7% simple interest) to a high of $7,580,099.59 (three-month certificates of deposits compounded). *See* Appendix A attached thereto.

As stated in *Wolf v. Frank, supra,* the matter as to whether or not to award prejudgment interest in a federal securities fraud case rests in the sound discretion of the district court, and any ruling on the issue should be based upon fundamental considerations of fairness. An award of prejudgment interest is a part of compensatory damages, but the compensatory nature of such an award must be "tempered by an assessment of the equities." *Norte & Co. v. Huffines,* 416 F.2d 1189, 1191 (2nd Cir. 1969). In awarding prejudgment interest, the district court must take care to determine that such an award is not punitive in nature. *See Chris-Craft Industries, Inc. v. Piper Aircraft Corp.,* 516 F.2d 172 (2nd Cir. 1975).

The court has determined that upon a consideration of the facts and circumstances herein involved that an award

of prejudgment interest in this case is in order,[2] but in an amount considerably less than that claimed by the plaintiffs. The court further concludes that any award of prejudgment interest in an amount in excess of the jury award of damages or for the full period claimed (approximately fifteen years) would be *punitive* rather than compensatory. In the first instance, much of the delay in getting this case in a posture where it could be presented to a jury can be attributed to the plaintiffs. There was some delay on the part of the plaintiffs in filing the law suit after they were put on notice that a cause of action existed. Also, the lawsuit was pending for a period of nine years from the filing to the beginning of the trial. A substantial part of the delay can be attributed to the actions or lack of action on the part of the plaintiffs. It should be noted that the plaintiffs changed lead counsel two times after the original lead counsel withdrew from the case. This is not to say that other delay was not caused by action or failure to act by various defendants. There are also examples of delay in the progress of bringing this case to trial which were agreed upon by the parties. There was tacit agreement between the parties that action of the district court on certain motions be stayed for a period of time pending a ruling by the Court of Appeals on an issue important to this case. Another matter which contributed to some delay is the fact, that due to changes in

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[2] In an effort to make a party whole, an award of prejudgment interest is particularly appropriate in cases involving investment fraud and breach of fiduciary duties. *See Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith,* 595 F. Supp. 171, 174 (M.D.Fla. 1984) and the cases cited therein at p. 174.

judicial personnel in this district, this case has been assigned to five different district judges at various times.

The court agrees with the plaintiffs that the overall period of time involved in any interest calculation is from September 8, 1969 to January 30, 1985 (date of merger to date of judgment).

Upon giving due consideration to the ten alternate rates of interest presented by the plaintiffs, the court is persuaded that only the use of the constant 7% (simple) interest rate would be fair and reasonable in this case, given the protracted period of time involved.[3] In effect, the court has determined that the Georgia statutory rate is more appropriate than the other rates suggested by the plaintiffs. *See* O.C.G.A. § 7-4-2. In order that the award of prejudgment interest in this case not be deemed to be punitive in nature, the court further determines that an award of only one-third of the total amount arrived at by applying the interest rate of 7% to the jury award for the full period of time may be recovered. Accordingly, the plaintiffs are entitled to recover as prejudgment interest on the federal securities claim in the amount of $945,-512.85. Due to the unliquidated nature of plaintiffs' claims, the plaintiffs are not entitled to recover prejudgment interest on the amount awarded under the Georgia common law fraud claim.

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[3] In making the ruling hereinabove as to the rate interest to be applied in this case, the court is not unmindful of the cases cited in Part III of plaintiffs' brief, such as *Johns Hopkins University* v. *Hutton*, 297 F. Supp. 1165 (D.Md. 1968) and like cases. The court has simply determined that the average money market approach is not appropriate in this case.

It is hereby ORDERED and ADJUDGED that plaintiffs shall recover of defendants E. T. Barwick Industries, Inc., M. E. Kellar, and B. A. Talley an award of prejudgment interest in the amount of Nine Hundred Forty-Five Thousand Five Hundred Twelve Dollars and Eighty-Five Cents ($945,512.85). Therefore, final judgment in this case shall be AMENDED to reflect this additional award of prejudgment interest on the federal securities claim.

SO ORDERED, this 12th day of July, 1985.

/s/ Horace T. Ward
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MILES OSTERNECK, GUY-KENNETH OSTERNECK, ROBERT OSTERNECK, MYLES OSTERNECK and GUY-KENNETH OSTERNECK AS TRUSTEES FOR THE BENEFIT OF ROBERT OSTERNECK,	)	
Plaintiffs,	)	CIVIL ACTION NO. C75-1728A
vs.	)	
E.T. BARWICK INDUSTRIES, INC., E.T. BARWICK, M.E. KELLAR, B.A. TALLEY and ERNEST AND ERNEST,	)	
Defendants.	)	

AMENDED JUDGMENT

The judgment heretofore entered in the above-stated case on January 30, 1985, is hereby amended by adding thereto "that plaintiffs, MILES OSTERNECK, GUY-KENNETH OSTERNECK, ROBERT OSTERNECK, MYLES OSTERNECK and GUY-KENNETH OSTERNECK AS TRUSTEES FOR THE BENEFIT OF ROBERT OSTERNECK, shall recover of defendants, E. T. BARWICK INDUSTRIES, INC., M. E. KELLAR, and B. A. TALLEY an award of prejudgment interest in the amount of NINE HUNDRED FORTY-FIVE THOUSAND FIVE HUNDRED TWELVE and 85/100 DOLLARS ($945,512.85) on the federal securities claim", and that said judgment remain the same in every other respect.

Dated at Atlanta, Georgia, this 9th day of July, 1985.

FILED AND ENTERED
IN CLERK'S OFFICE
JULY 9, 1985
LUTHER D. THOMAS, Clerk
By /s/ B. D. Hatcher
Deputy Clerk

LUTHER D. THOMAS, Clerk
By: /s/ Barbara D. Hatcher
Deputy Clerk

Myles OSTERNECK, et al.,
Plaintiffs-Appellees,

v.

E.T. BARWICK INDUSTRIES, INC., et al.,
Defendants.

Ernst & Whinney, Defendant-Appellant.

Myles OSTERNECK, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

v.

E.T. BARWICK INDUSTRIES, INC., et al.,
Defendants,

Melvin E. Kellar and Buford A. Talley,
Defendants-Appellants, Cross-Appellees.

Myles OSTERNECK, et al.,
Plaintiffs-Appellants,
Cross-Appellees,

v.

E.T. BARWICK INDUSTRIES, INC.,
Defendant.

E.T. Barwick, Defendants,

M.E. Kellar, Defendant-Appellant,
Cross-Appellee,

Buford Talley, Defendant-Appellant,
Cross-Appellant.

Ernst & Whinney, Defendant-Appellee,
Cross-Appellant.

Nos. 85-8523, 85-8593 and 85-8165.

United States Court of Appeals,
Eleventh Circuit.

Aug. 31, 1987.

Appeals from the United States District Court for the Northern District of Georgia.

Before HATCHETT and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

ANDERSON, Circuit Judge:

Over seventeen years ago, in September 1969, Cavalier Bag Company, Inc., merged into E.T. Barwick Industries, a subsidiary of the Barwick Corporation. Various members of the Osterneck family, plaintiffs in this action, were, at that time, owners of Cavalier. Pursuant to the merger, the Osternecks exchanged their stock in Cavalier for Barwick Industries stock.

Sometime later the Osternecks became aware of allegedly frudulent misrepresentations made to them in order to secure their approval of the merger. Specifically, they came to believe that Barwick Industries' financial statements for the two years preceding the merger misrepresented the company's financial condition. Consequently, on September 4, 1975, the Osternecks began this action alleging violations of §§ 10(b) and 20 of the Securities Act of 1934 (15 U.S.C. §§ 78j(b), 78t), Rule 10(b)(5) thereunder (17 C.F.R. § 240.10b-5) and the common law of Georgia.

Besides Barwick Industries, the Osternecks named as defendants several other individuals and organizations. Of these only four remain parties to this appeal: E.T. Barwick, B.A. Talley, and M.E. Kellar, who were directors and officers of Barwick Industries prior to or during the merger and Ernst & Whinney ("E & W"), the accountants responsible for preparing the allegedly fraudulent statements misrepresenting the financial condition of Barwick Industries.[1]

Following almost ten years of discovery, this case finally went to trial in October, 1984. After three and a

1. The financial statements were actually prepared by Ernst & Ernst. Since that time, however, the accounting firm has changed its name to Ernst & Whinney.

half months of testimony, the jury returned a verdict against defendants Barwick Industries, M.E. Kellar, and B.A. Talley in the amount of $2,632,234 as compensatory damages for violations of federal securities law and Georgia state common law. Judgment was entered in favor of E & W and E.T. Barwick, individually. Subsequently, the district court awarded the Osternecks pre-judgment interest on their federal securities claim in the amount of $945,512.85. These consolidated appeals ensued.

Tangled procedural maneuvering has created three separate appellate cases. For clarity's sake we briefly characterize them here: Case No. 85-8165 involves the Osternecks' appeal from all judgments rendered against them and includes the cross-appeals of most of the defendants. Case No. 85-8593 involves only the appeal by Barwick Industries, E.T. Barwick, Talley and Kellar and the Osternecks' cross-appeal against those parties. Case No. 85-8523 is an appeal by E & W from the district court's denial of expert fees in E & W's bill of costs.

I. JURISDICTION

As an initial matter, we confront several difficult jurisdictional questions. These difficulties arise out of the complicated procedural maneuvering which occurred following the initial entry of judgment against defendants Barwick Industries, Kellar and Talley. This first judgment for over two and a half million dollars was entered on January 30, 1985. At that time the Osternecks moved orally for the award of pre-judgment interest. On February 11, 1985, the Osternecks filed a written motion for prejudgment interest. During March 1985, the various parties filed notices of appeal and cross-appeal chal-

lenging the Janaury 30, 1985 judgment, including the Osternecks' March 1, 1985 notice of appeal.[2] It was not, however, until July 1 that the district court entered an order ruling upon the Osternecks' February 11 motion and awarding the Osternecks over $945,000 in prejudgment interest. A separate judgment, captioned as an "amended judgment," was entered on July 9. Following this amended judgment various notices of appeal and cross-appeal were filed. The Osternecks' filed only a single notice of appeal on July 31, 1985, which was captioned as a cross-appeal against Kellar, Talley, E.T. Barwick and Barwick Industries. The notice did not designate E & W as a party to the appeal.[3]

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2. In addition to the Osternecks' notice of appeal, Talley and Kellar also filed notices of appeal on March 1, 1985. On March 15, E & W filed a cross-appeal against the Osternecks and the Osternecks cross-appealed against Talley and Kellar. On March 28, the Osternecks cross-appealed against Barwick Industries.

3. In full, the notice of appeal read:

> NOTICE OF CROSS-APPEAL AGAINST M.E. KELLAR, BUFORD A. TALLEY, E.T. BARWICK INDUSTRIES, INC., AND E.T. BARWICK FROM THAT PORTION OF THE COURT'S ORDERS AND AMENDED JUDGMENT WHICH PROVIDE THE PREJUDGMENT INTEREST AND COSTS AWARDED TO PLAINTIFFS
>
> NOTICE IS HEREBY GIVEN that Myles Osterneck, Guy Kenneth Osterneck, and Robert Osterneck, and Myles Osterneck and Guy Kenneth Osterneck as Trustees for the benefit of Robert Osterneck, Plaintiffs in the above-styled action, hereby cross-appeal against M.E. Kellar, Buford A. Talley, E.T. Barwick Industries, Inc. and E.T. Barwick to the United States Court of Appeals for the Eleventh Circuit, from the portions of the Court's orders dated July 1, 1985 which provide the interest and costs awarded to Plaintiffs regarding Plaintiffs' Motion for Prejudgment Interest and

(Continued on following page)

A. *Cases Nos. 85-8165 & 85-8593*

These cases raise two interrelated jurisdictional issues. First, we must examine the effect and validity of the Osternecks' March 1, 1985 notice of appeal, and the other appeals and cross-appeals filed by the defendants during March 1985. The parties agree that if these notices were effective they would be sufficient to raise all issues the Osternecks seek to litigate on appeal. However, defendants Talley, Kellar, and E & W contend that these notices were ineffective because they were filed while a Rule 59(e) motion was pending before the district court. If the Osternecks' March 1, 1985 notice of appeal, and the other appeals and crossappeals filed in March 1985 are deemed ineffective, we must next decide whether the Osternecks' second notice of appeal filed on July 31, 1985, effectively preserved all issues for appeal.[4] Defendants Talley, Kellar, and E & W argue that this second notice of appeal did not preserve all the issues which the Osternecks now seek to litigate.[5]

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> Bill of Costs, from that portion of the Amended Judgment filed and entered on July 9, 1985 which provides the prejudgment interest awarded to Plaintiffs and from all previous non-final or interelocutory orders and all rulings which produced and preceded these Orders and Judgments.
>
> This 31 day of July, 1985.

Record on Appeal, vol. 24, Tab 511.

4. It is uncontested that the appellants Barwick Industries, E.T. Barwick, Talley and Kellar filed effective, timely second notices thereby preserving their appeals. As will appear below, however, E & W has foregone its right to appeal.

5. The Osternecks argue that the defendants are estopped to deny this court's jurisdiction, having originally conceded that jurisdiction for this appeal existed. However, it is well settled

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It is settled law that a notice of appeal filed while a motion to alter or amend the judgment under Rule 59(e) is pending can have no effect. *See* Fed.R.App.P. 4(a)(4);[6] *see also Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982); *Robinson v. Tanner*, 798 F.2d 1378, 1385 (11th Cir.1986). Thus, the jurisdictional question posed by this case is a clear one: should the Osternecks' February 11 motion for prejudgment interest be characterized as a motion, pursuant to Fed.R.Civ.P. 59(e), to alter or amend the district court's judgment. Because we conclude that this motion for discretionary prejdugment interest is properly characterized as a motion to alter or amend a final judgment of the district court, all notices filed in this case prior to the ruling on that motion, i.e., July 9, 1985, have no effect.

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that, as courts of limited jurisdiction, federal courts are obliged to undertake a jurisdictional inquiry whenever it appears that, in fact, no jurisdiction exists. *Blake v. Zant*, 737 F.2d 925, 926 (11th Cir.1984), *on reh'g*, 758 F.2d 523, *cert. denied*, — U.S. —, 106 S.Ct. 374, 88 L.Ed.2d 367 (1985); *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1102 (5th Cir.1981). Thus, any prior stipulation by the parties notwithstanding, the issue of our jurisdiction is now before us and must be addressed.

6. In relevant part, this rule reads:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . under Rule 59 . . . the time for appeal for all parties shall run from the entry of the order . . . granting or denying . . . such motion. A notice of appeal filed before the disposition of [a Rule 59 motion] shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion. . . .

Fed.R.App.P. 4(a)(4).

Our conclusion that a motion for prejudgment interest is a Rule 59(e) motion is influenced by several factors. First and foremost amongst these is the settled treatment of such motions by the other circuit courts of appeal They have uniformly concluded that a motion for discretionary prejudgment interest must be filed pursuant to Rule 59(e). *See Stern v. Shouldice*, 706 F.2d 742, 746-47 (6th Cir.), *cert. denied*, 464 U.S. 993, 104 S.Ct. 487, 78 L.Ed.2d 683 (1983); *Goodman v. Heublein, Inc.*, 682 F.2d 44, 45-47 (2d Cir.1982); *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147, 152-54 (1st Cir.1980).

This result may be easily explained. The discretionary award of prejudgment interest requires the district court to substantively reconsider its original judgment. This is precisely the sort of alteration or amendment contemplated by Rule 59(e). Such substantive modifications must be sought within ten days of the entry of judgment[7] and any decision rendered prior to disposition of the motion is not final for purposes of appeal. The rules of appellate procedure are designed to prevent precisely what has occrured in this case—the piecemeal appeal of non-final substantive judgments rendered by the district court.[8]

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7. The Osternecks' motion, served on February 11, 1985, was served within the ten-day time limit prescribed by Fed.R.Civ.P. 59(e). The tenth day after judgment actually fell on Saturday, February 9, and an extension until Monday was proper. Fed. R.Civ.P. 6(a).

8. One narrow exception to the general rule that motions for prejudgment interest should be treated under Rule 59(e) may exist. When the substantive law upon which the district court's judgment is based mandates an award of prejudgment

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The Osternecks argue, however, that their motion is not within the scope of Rule 59(e) because it addresses an issue collateral to the main cause of action. As support for this proposition, they cite *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982), in which the Supreme Court held that a post-judgment motion for an award of attorney's fees under 42 U.S.C. § 1988 was not governed by Rule 59(e).

Reliance upon *White* is misplaced. In *White*, the Court noted that an award of attorney's fees under § 1988 is "uniquely separable" from the main cause of action and, " 'does not imply a change in the judgment.' " *Id.* at 452, 102 S.Ct. at 1166 (quoting *Knighton v. Watkins*, 616

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interest, its omission from the judgment may be corrected as a clerical error by motion brought pursuant to Fed.R.Civ.P. 60(a). *See Glick v. White Motor Co.*, 458 F.2d 1287, 1293-94 (3d Cir.1972). The discretionary award of prejudgment interest can never fall within this exception. *See Goodman*, 682 F.2d at 45-46; *Scola*, 618 F.2d at 153. As the Osternecks have conceded, the award of prejudgment interest in this case was wholly within the district court's discretion. Neither the federal securities law nor the state common law fraud claims litigated by the Osternecks mandated the award of prejudgment interest. *See, e.g., Blau v. Lehman*, 368 U.S. 403, 414, 82 S.Ct. 451, 457, 7 L.Ed.2d 403 (1962); *Hembree v. Georgia Power Co.*, 637 F.2d 423, 429-30 (5th Cir.1981). Moreover, to the extent that any such exception to the general rule exists, the former Fifth Circuit has, in dicta, rejected this exception. *Warner v. City of Bay St. Louis*, 526 F.2d 1211, 1213 n. 4 (5th Cir.1976) ("To the degree these cases hold that interest which is added as a matter of right can always be corrected under Rule 60(a), we believe they should be rejected.") (binding precedent, *see infra* note 10). Of course, when an improper legal rate of interest is set by the district court, a party may also seek relief from the legally erroneous judgment under Rule 60(b). *Id.* at 1212-13.

F.2d 795, 797 (5th Cir.1980)). Our circuit has interpreted this to mean that Rule 59(e) applies only when a motion seeks reconsideration of substantive issues resolved in the judgment and not when a motion raises exclusively collateral questions regarding what is due because of the judgment. *See Lucas v. Florida Power & Light Co.*, 729 F.2d 1300, 1301 (11th Cir.1984). Thus, we have even concluded that the issue of attorney's fees is not always collateral to the action. When the liability for the award arises from a substantive contractual obligation and is "an integral part of the merits of the case" and therefore " 'compensation for the injury giving rise to an action,' " a motion for the inclusion of attorney's fees is a Rule 59(e) motion and tolls the time period for appeal. *C.I.T. Corp. v. Nelson*, 743 F.2d 774, 775 (11th Cir.1984) (quoting *White*, 455 U.S. at 452, 102 S.Ct. at 1166-67); *accord Beckwith Machinery Co. v. Travelers Indemnity Co.*, 815 F.2d 286 (3d Cir.1987). *But see Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 282-94 (7th Cir.1985).

It cannot be doubted that prejudgment interest is compensation which directly stems from the injury giving rise to the action. *Norte & Co. v. Huffines*, 416 F.2d 1189, 1191 (2d Cir.1969); *cert. denied*, 397 U.S. 989, 90 S.Ct. 1121, 25 L.Ed.2d 396 (1970). Thus, a motion to award prejudgment interest requests a substantive alteration of a court's judgment and must be made pursuant to Rule 59(e). Hence, in the instant case, the district court's judgment was not made final until the entry of its

amended judgment on July 9, 1985, and all notices of appeal filed prior to that date were ineffective.[9]

In order to avoid the effects of this ruling, the Osternecks argue that their original notices of appeal and cross-appeal filed in March are, nonetheless, effective because they fall within the scope of two special exceptions which validate premature notices of appeal. First, they argue that an interlocutory appeal from a nonfinal decision may, nonetheless, be treated as an appeal from a final order if the nonfinal judgment has subsequently been finalized. *See Jetco Electric Industries, Inc. v. Gardiner*, 473 F.2d 1228, 1231 (5th Cir.1973);[10] *cf. Anderson v. Allstate Insurance Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980). However, *Jetco* holds only that a "premature notice of appeal is valid if filed from an order dismissing a claim or party and followed by a subsequent final judgment without a new notice of appeal being filed. *Robinson*, 798 F.2d at 1385 (footnote omitted). In this case, the earlier nonfinal order was not one which dismissed a

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9. As an alternative to this resolution, E & W urges us to adopt the per se rule recently announced by the Fifth Circuit in *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665 (5th Cir.) (en banc), *cert. denied*, — U.S. —, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986). That court concluded that any post-judgment motion served within ten days of the entry of judgment (except a motion to correct purely clerical errors under Rule 60(a)) would be treated as a motion under Rule 59(e). *Id.* at 667. Absent en banc reconsideration by our own court, we are not free to adopt this bright line rule. Moreover, our own distinction between collateral and noncollateral matters is sufficient for the purpose at hand and achieves the same result as that suggested by *Horcan's* per se rule.

10. This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

claim or a party. Rather, it only rendered judgment upon a jury verdict. Thus, the Osternecks' premature appeal does not fall within the scope of the *Jetco* rule. Moreover, in *Martin v. Campbell*, 692 F.2d 112, 114-16 (11th Cir. 1982), this court determined that *Jetco* could not validate a premature notice of appeal which was filed while a Rule 59 motion was pending. We concluded that Fed.R.App.P. 4(a)(4) spoke directly to the validity of such appeals and precluded validation of a premature notice under *Jetco's* equitable exception.

As a final argument, the Osternecks contend that they fall within the "unique circumstances" exception to the timely appeal requirement. This exception, developed by the Supreme Court in *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964) (per curiam), commands that an appellate court "should hear an appeal even though it is not timely, if the appellant reasonably relied on an erroneous statement of the district court that the appeal . . . was timely, and the appeal would have been timely if the district court had been correct." *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 111 n. 2 (7th Cir. 1985) (citation omitted).

The Osternecks contend that they have relied upon several actions of the district court which indicated that the January 30, 1985 judgment was final and appealable. These include the district court's subsequent orders granting E & W's bill of costs, denying E.T. Barwick's motion for an extension of time to file its bill of costs, and denying E.T. Barwick Industries' motion to stay the executions of the January 30 judgment. In addition, the clerk of the district court required the Osternecks to pay an additional filing fee for their notice of cross-appeal filed after the

district court's July 9 amended judgment. The Osternecks argue that this requirement indicates that the clerk did not treat the Osternecks' motion for prejudgment interest as a motion under Rule 59. Had the clerk believed that a Rule 59 motion had been made he would have acted pursuant to Fed.R.App.P. 4(a)(4) which provides that no additional fees shall be required for a second notice of appeal filed after a Rule 59 motion has been ruled upon. Finally, the Osternecks contend that they relied upon this court's failure to originally notify them that jurisdiction was questionable.

We do not believe that any of these factors are sufficient to create the "unique circumstances" necessary to validate a premature appeal. At no time has the district court or this court every affirmatively represented to the Osternecks that their appeal was timely filed, nor did the Osternecks ever seek such an assurance from either court. Indeed, the *Thompson* exception is designed to permit an appeal when a party has done an act which, if properly done, would postpone the deadline for filing his appeal and has been assured by a judicial officer that this act has been properly done. *Thompson*, 375 U.S. at 387. The Osternecks do not suggest that any court officer has ever assured them that they have been granted an extension of time within which to file an appeal.[11]

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11. Moreover, to the extent the Osternecks may have erroneously relied upon the actions of the district court, they did so despite the district court's express statements that the judgment would have to be "amended" to include prejudgment interest. See Record on Appeal, vol. 82 at 8497 ("if prejudgment interest is granted it will be—the judgment can be amended"); *cf. id.* vol. 24, Tab 508 (entering "amended judgment" awarding prejudgment interest). Rule 59(e) is, of course, the only vehicle by which prior district court judgments may be "amended."

For the foregoing reasons, we conclude that we do not have jurisdiction to hear the appeal in Case No. 85-8165 (i.e., the Osternecks' March 1, 1985 appeal and the defendants' cross-appeal during March 1985). That appeal is accordingly ordered dismissed.[12]

Having concluded that all of the notices of appeal filed prior to the district court's amended judgment on July 9, 1985 are ineffective, we must next determine the efficacy of the Osternecks' subsequent notice of cross-appeal filed on July 31, 1985. The Osternecks contend that, even though their appeal in Case No. 85-8165 may be dismissed, all the issues they seek to litigate in that ap-

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12. In an effort to resuscitate their appeal, the Osternecks have made several motions. First, they seem to have requested that we order the district court to grant them an extension of time in which to file their appeal. Though the district court may entertain such a motion, an appellate court is expressly prohibited from enlarging the time for filing a notice of appeal. Fed.R.App.P. 26(b). In the alternative the Osternecks' motion may be construed as a request that this court stay its hand and permit a limited remand so that the district court may determine whether an extension of time is appropriate. This we decline to do. The need for the orderly disposition of appeals indicates that such limited remands are strongly disfavored and the Osternecks have suggested no reason why the district court could not as readily deal with a motion for an extension following our dismissal of the instant appeal. Indeed, there is currently pending before the district court a motion for an extension of time in which to file an appeal. The district court has deferred ruling on this motion pending our disposition of this appeal. *United States v. Hitchmon*, 602 F.2d 689, 692 (5th Cir.1979). Following this dismissal, the district court may entertain the Osternecks' motion. The grant or denial of such a motion is entrusted to the district court's sound discretion. *Wansor v. George Hantscho Co.*, 570 F.2d 1202, 1205-07 (5th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 350, 58 L.Ed.2d 344 (1978); *In re O.P.M. Leasing Services*, 769 F.2d 911 (2d Cir.1985).

peal are preserved for litigation in Case No. 85-8593 by their July 31 notice. By its terms, however, this notice of cross-appeal does not expressly raise any issues for appeal against E & W. E & W contends that the failure to name them in the notice of appeal renders the notice ineffective insofar as it seeks to raise any issues on appeal against E & W. We agree.

The general rule in this circuit is that an appellate court has jurisdiction to review only those judgments, orders or portions thereof which are specified in an appellant's notice of appeal. *See Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1374-75 (11th Cir.); *cert. denied*, 464 U.S. 893, 104 S.Ct. 239, 78 L.Ed.2d 230 (1983); Fed.R.App.P. 3(c) (requiring that a notice of appeal "designate the judgment, order or part thereof appealed from"). *But see Lynn v. Sheet Metal Workers*, 804 F.2d 1472, 1481 (9th Cir.1986). Although we generally construe a notice of appeal liberally, we will not expand it to include judgments and orders not specified unless the overriding intent to appeal these orders is readily apparent on the face of the notice. We have previously concluded that, where some portions of a judgment and some orders are expressly made a part of the appeal, we must infer that the appelllant did not intend to appeal other unmentioned orders or judgments. *Mestre*, 701 F.2d at 1374-75; *see also C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1055-56 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 974, 71 L.Ed.2d 112 (1981).[13]

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13. This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

We conclude that an analogous rule would apply when an appellant expressly names some of his opponents but fails to include other opposing parties within the notice of appeal. *See Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252 (3d Cir.1977) (depriving appellate jurisdiction with respect to defendants not named in notice of appeal); *Parrish v. Board of Commissioners*, 505 F.2d 12, 15-16 (5th Cir.1974) (notice naming appellants "PARRISH, ET AL., Plaintiffs" sufficient to demonstrate that all plaintiffs intended to appeal), *vacated*, 509 F.2d 540, *reh'g en banc*, 524 F.2d 98 (1975), on remand, 533 F.2d 942, 945 (1976) (deeming issue mooted by filing of curative notice of appeal). Since the text of the Osternecks' July 31, 1985 notice, *see supra* note 3, expressly preserves an appeal against Barwick, Barwick Industries, Talley and Kellar, we must, by inference, conclude that the Osternecks chose to forego any appeal against E & W.

Moreover, to now permit the Osternecks to use their July 31 notice as a vehicle for an appeal against E & W would unfairly prejudice E & W. No doubt relying upon the Osternecks' failure to appeal the judgment in its favor, E & W has foregone any cross-appeal it might have had. A cross-appeal, had one been filed, could have raised many of the issues which we will address in connection with Case No. 85-8593. Indeed, when the Osternecks had earlier appeared to perfect an appeal against E & W by their March 1 notice of appeal, E & W promptly filed a notice of cross-appeal on March 15. Thus, it is evident that E & W has reasonably relied upon the fact that the Osternecks did not name them in their July 31 notice. To allow the Osternecks to now use that notice to raise an appeal against E & W would be inequitable.

Consequently, the issues the Osternecks seek to litigate against E & W are not preserved in Case No. 85-8593.

As our discussion makes plain, however, we do have jurisdiction over Case No. 85-8593, because the notices of appeal were filed after the district court entered its final judgment. The scope of these notices expressly embraces the appeals by Barwick Industries, E.T. Barwick, Talley and Kellar as well as the Osternecks' July 31, 1985 cross-appeal against those parties. Talley and Kellar have argued that the Osternecks' second notice specified only that portion of the final judgment relating to prejudgment interest and thus did not raise against them any issues other than the propriety of the prejudgment interest award expressly mentioned in the notice. We need not address this argument, however, because in this appeal against Talley and Kellar, the Osternecks have briefed only the prejudgment issue and have, consequently, abandoned any other assignments of error against Talley and Kellar. *Harris v. Plastics Manufacturing Co.*, 617 F.2d 438, 440 (5th Cir.1980). All parties agree that the July 31, 1985 notice was sufficient to permit the Osternecks to appeal from the district court's order which awarded prejudgment interest only on the federal securities claim and reduced by two-thirds the amount of interest requested by the Osternecks. Thus, all issues raised by the Osternecks in case No. 85-8593 against Talley and Kellar are properly before us, as well as the issues raised by the Talley and Kellar appeals, and we have jurisdiction to hear the case.[14]

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14. The Osternecks' cross-appeal also names Barwick Industries and E.T. Barwick and manifests an intent to appeal against

(Continued on following page)

B. *Case No. 85-8523*

This case presents a slightly different issue of appellate jurisdiction. On May 22, 1985, while the Osternecks' motion for prejudgment interest was pending before the district court, the district court ruled on E & W's motion for costs incurred while successfully defending against the Osternecks' action. In this order, the district court concluded that it was without authority to award fees for expert witnesses beyond the nominal statutory amount recoverable under 28 U.S.C. § 1821.[15] On June 21, 1985, E & W appealed from the district court's May 22 order.

Though orders awarding or denying costs are not ordinarily appealable, *Newton v. Consolidated Gas Co.*, 265 U.S. 78, 82-83, 44 S.Ct. 481, 482-83, 68 L.Ed. 909 (1924), when the refusal to tax an item of cost is not based upon an exercise of discretion but rather upon a district court's conclusion that it lacked the power to tax costs that order is appealable. *See McWilliams Dredging Co. v. Department of Highways*, 187 F.2d 61 (5th Cir.

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those parties. Nowhere in their briefs, however, have the Osternecks sought to raise any issue on appeal against Barwick Industries. Nor could they be deemed to have raised any beyond those asserted against Talley and Kellar, Barwick Industries' codefendants. Insofar as the Osternecks' briefs on appeal raise issues challenging the validity of the verdict in favor of E.T. Barwick, those issues are properly presented to us and we have jurisdiction to consider their merits as part of Case No. 85-8593. However, these issues have no merit. *See infra* n. 18.

15. This ruling accords with our circuit's prior decision in *Kivi v. Nationwide Mutual Ins. Co.*, 695 F.2d 1285 (11th Cir.1983). The Supreme Court has recently confirmed that our interpretation of the law is correct. *See Crawford Fitting Co. v. J.T. Gibbons*, — U.S. —, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987).

1951). Moreover, it is evident that an appeal respecting costs is an appeal of a collateral matter which does not seek reconsideration of substantive issues before the court. *Lucas*, 729 F.2d at 1301. Thus, our analysis above suggests that E & W's appeal is of a collateral matter and that a request for costs is not a motion under Rule 59(e).

This, however, does not dispose of the question. Simply because an order, such as an order taxing costs, is generally appealable it does not follow that any particular order is appealable. In this case, the order appealed from was entered prior to the district court's final disposition of all substantive issues in the case. This exactly reverses the typical procedure contemplated by Fed.R.Civ.P. 58, which provides that "[e]ntry of the judgment shall not be delayed for the taxing of costs."

By statutory authority, this court has jurisdiction only of appeals from final decisions of the district courts. 28 U.S.C. § 1291.[16] We may not hear appeals even from fully consummated decisions when they are but steps towards a final judgment into which they merge. We see no reason for concluding that the order taxing costs against the Osternecks was anything but such an intermediate step that merged into the subsequent July 9 final judgment of the district court and was appealable only at that time. Hence, E & W's appeal must be dismissed as an appeal from a nonfinal order of the district court.

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16. This statutory grant of appellate jurisdiction provides that:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts. . . .

28 U.S.C. § 1291.

Nor can E & W seek to avoid the finality rule by application of the *Cohen* doctrine. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) (permitting appeal of certain nonfinal collateral issues). In the first place, it is not at all apparent that the *Cohen* doctrine can ever apply to notices of appeal filed during the pendency of a Rule 59 motion, such as the Osternecks' motion for prejudgment interest in this case. By its very terms, Rule 4(a)(4) mandates that "the time for appeal for *all* parties" shall run from the entry of an order granting or denying a Rule 59 motion. Fed.R.App.P. 4(a)(4) (emphasis supplied). Thus, one might conclude that the express terms of Rule 4(a)(4) render any notice of appeal filed during the pendency of a Rule 59 motion a nullity, no matter what that notice's otherwise appealable character.

We need not sweep so broadly in our ruling, however. Indeed we assume *arguendo* that the *Cohen* doctrine, if applicable, would validate a notice of appeal from a nonfinal collateral order filed during the pendency of a Rule 59 motion. However, it is evident that E & W's appeal of the order taxing costs does not meet the stringent requirements of the *Cohen* doctrine. In order for a nonfinal order to be appealable as a collateral matter under the *Cohen* doctrine, it must be clear that awaiting a timely appeal from the complete final judgment would effectively prevent review of the order in question. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457-58, 57 L.Ed.2d 351 (1978). *Cohen*, 337 U.S. at 546, 69 S.Ct. at 1225-26. No suggestion has been made, nor could one be, that the district court's order taxing costs would be unre-

viewable had E & W awaited final judgment before taking its appeal. Consequently, the *Cohen* doctrine is inapplicable.

For the foregoing reasons we conclude that the appeal in Case No. 85-8523 must be dismissed for want of jurisdiction because it is an appeal from a nonfinal order of the district court.

II. CASE NO. 85-8593—THE MERITS

Having concluded that we have jurisdiction only to determine the merits of Case No. 85-8593, we now turn our attention to the issues presented in that case. No. 85-8593 involves the issue raised by Talley and Kellar in their appeals,[17] and the prejudgment interest issue raised by the Osternecks in their cross-appeal.[18]

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17. Though E.T. Barwick and Barwick Industries filed notices of appeal, those appeals have been dismissed pursuant to Eleventh Circuit Rule 16(b). Hence, the judgment of the district court against Barwick Industries stands, and E.T. Barwick's appeal is abandoned.

18. The Osternecks also assert three claims challenging the verdict in favor of E.T. Barwick: (1) that the court improperly instructed the jury on the scienter requirement for aiding and abetting liability; (2) that the court improperly instructed the jury on the elements of a Rule 10b-5 claim; and (3) that no reasonable jury could have entered a verdict in Barwick's favor.

Any error in the jury instruction on aiding and abetting scienter was harmless. The jury found that Barwick was not primarily liable to the Osternecks under Rule 10b-5. The scienter requirement for 10b-5 is less than the proper scienter requirement for aiding and abetting liability. Accordingly, since the jury found no scienter for the primary liability, it could have found none for secondary liability either. *Cf. Cavalier Carpets, Inc. v. Caylor*, 746 F.2d 749, 758-59 (11th Cir.1984).

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On appeal, Talley argue: (1) that the district court improperly charged the jury with a four-year statute of limitations for the federal securities law claims; (2) that consequently, since prejudgment interest is not available under Georgia law, the award of prejudgment interest made by the district court under the federal securities law must be vacated; (3) that the district court improperly imposed upon him the burden of rebutting the Osternecks' bill of costs; and (4) that the district court erred in allowing his codefendants to cross-examine him when he testified at trial.

Appellant Kellar raises the following issues: (1) that the district court improperly charged a four-year statute of limitations on the federal securities claims; (2) that the district court erred in concluding that fraudulent concealment by third parties would toll the running of the federal securities statute of limitations against him; (3) that there was insufficient evidence to support a judgment that he was liable to the Osternecks on the federal securities claims; and (4) that there was insufficient evidence of scienter to support a judgment against him on the state common law fraud claims.

In reply the Osternecks contend: (1) that Talley and Kellar have waived their right to assign as error the district court's instruction to the jury applying the four-year statute of limitations to the federal securities claim; (2)

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We have closely examined the Osternecks' remaining allegations of error with respect to the verdict in Barwick's favor and find that they are without merit and warrant no discussion.

that any error in charging the jury on the federal securities statute of limitations was harmless; and on cross-appeal the Osternecks contend (3) that the district court abused its discretion in reducing by two-thirds the amount of prejudgment interest awarded to them.

A. *Statute of Limitations for the Federal Securities Claim*

Talley and Kellar assert that the district court committed several errors in determining the statute of limitations applicable to the Osternecks' federal securities claims. If Talley and Kellar had been successful in bringing themselves within the protection of the statute of limitations, thus barring the federal securities claims, the award of prejudgment interest would have to be vacated, since prejudgment interest is not available on the state law claims in this particular case. *See infra*, note 24.

The federal securities laws do not provide a specific statute of limitations for private rights of action asserted under §§ 10(b), 20 and Rule 10b-5. Thus, federal courts are required to borrow the most appropriate statute of limitations from the forum state. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 N. 29, 96 S.Ct. 1375, 1389 n. 29, 47 L.Ed.2d 668 (1976); *Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500, 1502 (11th Cir. 1986).

In this case, the district court originally concluded that the two-year statute of limitations provision of Georgia's Securities Act was applicable. *See Osterneck v. E.T. Barwick Industries, Inc.*, 79 F.R.D. 47, 50-51 (N.D.

Ga.1978) (applying Ga.CodeAnn. § 97-114 (1973).[19] Subsequently, however, the district court accepted the Osternecks' argument that Georgia's four-year statute of limitations for common law fraud was the proper statute of limitations to borrow. In reaching this conclusion, the district court relied upon the district court opinion of Judge Shoob in the *Friedlander* case. *See Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 595 F.Supp. 1442, 1443-52 (N.D.Ga.1984) (applying O.C.G.A. § 9-3-31 (1982),[20] *rev'd*, 788 F.2d 1500 (11th Cir.1986). Thus, when this case was sent to the jury, they were instructed that the suit was timely brought if it was initiated within four years of when the Osternecks knew or reasonably should have known through the exercise of due diligence that they had a cause of action against the defendants.

This instruction also had the effect of tolling the statute of limitations. Even under a four-year statute of limitations, the Osternecks might have been required to begin litigation by September 1973—4 years after the 1969 merger. The court's instruction permitted the jury to conclude that the suit was timely, however, if they found that the Osternecks did not know and through due dili-

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19. The Georgia Securities Act of 1957 is applicable to this case. The alleged fraud occurred in 1969 prior to Georgia's revision of its securities law in 1973. However, the two-year statute of limitations for securities violations in the 1973 law is identical to that in section 13 of the 1957 Act. *See McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888, 892 n. 9 (5th Cir.1979). The 1973 statute has since been recodified. O.C.G.A. § 10-5-14 (1982).

20. This four-year statute of limitations for fraud, codified in 1982, is identical to that in effect in 1969. Ga.Code Ann. § 3-1002.

gence could not have known of the existence of their cause of action before September 4, 1971—the date four years before they filed suit.

Appellants Talley and Kellar now seek a new trial, arguing first that a two-year statute of limitations should properly have been charged to the jury. Because Talley and Kellar failed to object to the jury charges as required by Fed.R.Civ.P. 51, our review is restricted to one of plain error. Since we conclude that the district court's charge was not plainly erroneous, we reject the appellants' assertion that a new trial is necessary.

The law in this circuit is clear. Pursuant to Fed.R.Civ.P. 51, one who wishes to challenge on appeal a district court's instruction to the jury on the ground that it was an erroneous statement of the law must have objected to the instruction at trial. *See Kenney v. Lewis Revels Rare Coins, Inc.*, 741 F.2d 378, 382 (11th Cir.1984). One may not rely on the objections made by co-parties to the action, but, rather must expressly adopt a co-parties objection as his own. *Id.* In the obsence of an objection, a defendant is deemed to have waived his right to assign as error the district court's jury charge. We will depart from this rule only in narrow circumstances when an error is "so fundamental as to result in a miscarriage of justice," *see Barnett v. Housing Authority*, 707 F.2d 1571, 1580 (11th Cir.1983) (quoting *Patton v. Archer*, 590 F.2d 1319, 1322 (5th Cir.1979)), or when the district court's instruction amounts to plain error, *see Barnett*, 707 F.2d at 1581 n. 18; *Johnson v. Bryant*, 671 F.2d 1276, 1281 (11th Cir.1982). *But see Williams v. Butler*, 746 F.2d 431, 443-44 (8th Cir.1984).

In the instant case, both Talley and Kellar failed to object to the district court's statute of limitations charge. Indeed, they were not even represented at trial having, by their own stipulation, been excused from attending the lengthy proceedings. Thus, though their codefendants E & W and E.T. Barwick did object to the jury instruction, Talley and Kellar did not adopt these objections. Consequently, they have failed to preserve the issue for review on appeal unless the instruction was plainly erroneous.

Nor will it do for Talley and Kellar to argue that the district court's decision permitting them to be absent from trial somehow excuses them from their obligations pursuant to Rule 51. This would create the perverse result of according greater lenity to those who do not appear at trial than to those who do appear but merely neglect to adopt the objections of their codefendants.

Moreover, both Talley and Kellar were fully aware that the district court was reconsidering its earlier determination to charge a two-year statute of limitations. They were both served with voluminous memoranda on the subject submitted by the Osternecks and E & W, yet neither offered any reply of their own.[21] Thus, Talley and Kellar had ample opportunity to place their objections to the jury charge on the record as required by Rule 51. By failing to do so, they limited their own rights on appeal

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21. Moreover, had Talley and Kellar been present at trial they might have sought a special verdict from the jury assessing liability under a two-year statute of limitations. The record indicates that the district court would have been receptive to such a suggestion.

and may only receive a new trial if the jury instruction amounted to plain error.[22]

In the circumstances of this case, we cannot conclude that the trial court was plainly erroneous in charging the jury as it did. As the Supreme Court has recognized, a "court's interpretation of the contours of [an area of legal uncertainty] hardly could give rise to plain judicial error [when] those contours are . . . in a state of evolving definition and uncertainty." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256, 101 S.Ct. 2748, 2754, 69 L.Ed.2d 616 (1981); *see also Barnett*, 707 F.2d at 1581 n. 18; *Black v. Stephens*, 662 F.2d 181, 184 n. 1 (3d Cir.1981), *cert. denied*, 455 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1982).

The district court's jury instructions in this case were rendered at a time when the law concerning which statute of limitations to borrow from the forum state was uncer-

22. Talley and Kellar can find no comfort in our decision in *Lang v. Texas & P. Ry. Co.*, 624 F.2d 1275 (5th Cir.1980). There we concluded that the failure to object to a jury charge "may be disregarded if the party's position has previously been made clear to the court and it is plain that a futher objection would be unavailing." *Id.* at 1279 (citation omitted). Appellants have satisfied neither prong of this requirement. Though their general position on the statute of limitations issue had been made clear to the court, neither Talley nor Kellar had addressed the immediate issue presented—the applicability of the then recently decided *Friedlander* district court opinion. Moreover, it could not have been plain that an objection would prove unavailing. The district court had previously chosen to apply a two-year statute of limitations and might easily have concluded that the *Friedlander* decision was distinguishable or that its earlier decision should not, for reasons of equity, be disturbed. Thus, the limited exception to Rule 51 contemplated in *Lang* is not applicable to this case.

tain. Applying a case-by-case analysis, the district court followed an earlier decision of the *Friedlander* district court, 595 F.Supp. at 1443-52, which chose a four-year statute of limitations in a similar securities case fraud case.

It was not until several months later that the Supreme Court, in *Wilson* v. *Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), revised the method by which courts should choose the appropriate statute of limitations to borrow and determined that lower courts must analyze the question on a statute-by-statute basis. Moreover, it was not until May 1986, over one year later, that this court first had occasion to apply the *Wilson* standard to a case involving the appropriate statute of limitations to be borrowed for federal securities claims. In *Friedlander*, 788 F.2d at 1507-09, we concluded that for all federal securities cases the appropriate statute of limitations to borrow is that of the Georgia Securities Act. Thus, though *Friedlander* now makes clear that the district court should properly have charged a two-year statute of limitations (since that is now and was in 1969 the statute of limitations in the Georgia Securities Act), we cannot say that the court's erroneous four-year charge was plain judicial error.[23] Given the uncertain and evolving contours of the law regarding the appropriate statute of limitations to borrow, we think the district court was

23. It follows, *a fortiori*, that the error was not so fundamental as to result in a miscarriage of justice.

reasonable in its erroneous conclusion that a four-year statute of limitations should apply.[24] For these reasons,[25]

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24. Nor should the resolution we reach in this case be considered an inequitable one. Had a new trial been required because of an improper jury charge, it is likely, *see infra* note 31, that the only issue which such a new trial would resolve is the question of prejudgment interest. Though the damage judgment against Talley and Kellar was independently supported by the jury's finding that they were liable for common law fraud, prejudgment interest on the fraud judgment would not be available to the Osternecks because they failed to comply with Georgia's statutory notice and demand requirement for prejudgment interest on unliquidated damages. *See* O.C.G.A. § 51-12-14. It was only this oversight by the Osternecks' attorneys which makes the federal statute of limitations question relevant; had the proper notice been filed an award of prejudgment interest under Georgia law would have provided an independent ground for affirmance and permitted us to pretermit the statute of limitations question. Thus, in some sense, the "inequity" of holding Talley and Kellar to the stringent requirement of Rule 51 is balanced by the "inequity" inherent in the stringent requirement of O.C.G.A. § 51-12-14 whose operation is all that renders the statute of limitations question relevant in the first place.

25. An additional ground for decision suggests itself. In *Saint Francis College v. Al-Khazraji*, — U.S. —, 107 S.Ct. 2022, 2025-26, 95 L.Ed.2d 582 (1987), the Supreme Court concluded that changes in a statute of limitations made pursuant to the commands of *Wilson* should not be applied retroactively if the change would overrule clear circuit precedent upon which the complaining party was entitled to rely and if the retroactive application would be inconsistent with the purpose of the underlying substantive statute. *Cf. Goodman v. Lukens Steel Co.*, — U.S. —, — - —, 107 S.Ct. 2617, 2620-22, 96 L.Ed. 2d 572 (1987) (applying *Wilson* retroactively where circuit precedent was unclear. Plainly our decision in *Friedlander* revised prior clear circuit precedent. *See McNeal*, 598 F.2d at 892. However, the parties have not briefed the issues of justifiable reliance and consistency with the purposes of the underlying Securities Act. Thus, we decline to rest our decision upon the *St. Francis* analysis and content ourselves with merely noting that it tends to support our conclusion that no plain error has occurred.

Talley and Kellar's assertion that the erroneous jury charge entitles them to a new trial is without merit.[26]

Kellar also argues that the district court erred in instructing the jury that the statute of limitations was tolled until such time as the Osternecks knew or through due diligence should have known of the existence of their cause of action. This instruction, Kellar contends, improperly allowed the fraudulent concealment of third parties, such as Talley and Barwick Indsutries, to be attributed to him. Instead, Kellar argues, the four-year statute of limitations should not be tolled against him because he did not do any fraudulent acts which would have concealed the Osternecks' cause of action. Were we to accept Kellar's argument the statute of limitations would have expired four years after the merger and the Osternecks' suit against Kellar would be barred.

Kellar, however, is mistaken.[27] Though the limitations period for a securities claim is borrowed from the forum state "the date when a claim accrues so as to trigger the state law limitation period is matter of federal law." *Sargent v. Genesco, Inc.*, 492 F.2d 750, 758 (5th Cir.1974). Under federal law the statute of limitations for a fraud action may be equitably tolled. *See Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946) (tolling limitations period in action under Federal

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26. Our resolution of the issue in this matter makes it, of course, unnecessary to consider the Osternecks' argument that any error in charging a four-year limitation period was harmless.

27. Consistent with our conclusion above, we review this instruction under the plainly erroneous standard. We conclude, however, that the district court instruction was a correct statement of the law and would have been sustained under any standard of review.

Farm Loan Act). This equitable tolling doctrine is plainly available to federal securities law plaintiffs. *Schaefer v. First National Bank*, 509 F.2d 1287, 1295-96 (7th Cir. 1975), *cert. denied*, 425 U.S. 943, 96 S.Ct. 1682, 48 L.Ed.2d 186 (1976). Equity mandates that the statute of limitations be tolled until the fraud is discovered, *Sargent*, 492 F.2d at 758, provided that the plaintiff injured by fraud "remains in ignorance of it without any fault or want of diligence or care on his part," *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123, 128 (7th Cir.1972) (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348, 22 L.Ed. 636 (1875)). Since the jury instructions plainly charged the jury with this exact standard, Kellar's contention that the district court erred is without merit.[28]

B. *Other Federal Issues*

Several other issues pertaining to the federal securities judgment have been raised by the parties. First, appellant Kellar contends that there was insufficient evi-

28. Kellar attempts to distinguish this line of cases, arguing that none involve situations where the existence of the cause of action was concealed by third parties and not by the defendant who seeks to take advantage of the statute of limitations. However, a well-established line of cases articulates an equitable tolling doctrine that does not depend upon affirmative concealment after the initial fraud. Where, as in this case, concealment is inherent in the nature of the wrong done, *cf. Hobson v. Wilson*, 737 F.2d 1, 33-36 (D.C. Cir.1984) (characterizing such acts as self-concealing fraud), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985), all that is necessary to toll the statute is a plaintiff's due diligence in seeking to discover the fraud, *id.* at 34 n. 103 (collecting cases applying this rule). *See also, Trecker v. Scag*, 679 F.2d 703, 708 (7th Cir.1982). Since only a demonstration of due diligence is necessary and since the Osternecks have made such a demonstration to the jury's satisfaction, the requirements for tolling the statute of limitations against Kellar have been satisfied.

dence to support the judgment against him. After carefully reviewing the record, we conclude that there was sufficient credible evidence of Kellar's direct liability to allow a jury to enter judgment against him,[29] and that this issue warrants no further discussion.

Appellant Talley raises two additional issues on appeal: (1) whether the district court improperly shifted to him the burden of rebutting the Osternecks' bill of costs; and (2) whether the district court erred in permitting his codefendants to cross-examine him at trial. We have closely examined these questions and find that the assignment of error are without merit and warrant no discussion.

The final federal issue posed is the Osternecks' contention that the district court abused its discretion in awarding prejudgment interest only in the amount of $945,512.85.[30] In making this award, the district court exercised two forms of discretion. First, the court chose to award prejudgment interest at the rate of 7% annually, not compounded. This required a total

29. Kellar also contends that there was insufficient evidence to support a judgment of liability against him on the theories that he aided and abetted Barwick Industries' securities fraud or that he was a controlling person in Barwick Industries within the meaning of the securities law. Because we conclude there was sufficient evidence to support a finding of direct liability, we need not consider these issues.

30. Talley and Kellar do not challenge the amount of the award. Their sole contention in this regard is that the award of prejudgment interest must be vacated because the judgment against them on the federal securities claims was based upon an improper jury instruction with respect to the statute of limitations. We have, however, rejected their contention that the federal judgment was improper. Hence, Talley and Kellar's challenge to the award of prejudgment interest must also be rejected.

interest award of over 2.8 million dollars. Though this interest award exceeded the principal judgment of $2,632,234, it was nonetheless, the smallest interest award the trial court could have rendered. Other methods of calculation, for example compounding the principal in three-month certificates of deposit for the entire period of this litigation, would have produced interest awards of over 7 million dollars.

In its second exercise of discretion, the district court then determined that its initial interest award of some 2.8 million dollars should be reduced by two-thirds. This reduction reflected the district court's conclusion that: (1) an interest award in excess of the principal sum would be punitive; and (2) that a substantial portion of the delay in bringing this suit to a conclusion could be attributed either to actions the plaintiffs had taken or to delays inherent in the federal judicial system. Thus, the district court concluded that the defendants, having been responsible for no more than one-third of the delay in bringing this suit to trial, were responsible for only one-third of the prejudgment interest which might be awarded. Consequently, the district court awarded prejudgment interest on the federal securities claim in the amount of $945,512.85. The Osternecks challenge only this second exercise of discretion.

It is clear that whether "prejudgment interest should be awarded on a damage recovery in a [federal securities] action is a question of fairness resting within the District Court's sound discretion." *Wolf v. Frank*, 477 F.2d 467, 479 (5th Cir.), *cert. denied*, 414 U.S. 975, 94 S.Ct. 287, 38 L.Ed.2d 218 (1973). Moreover, in awarding prejudgment interest, the district court must insure that the award is

not punitive in nature. *Norte & Co. v. Huffines*, 416 F.2d 1189, 1191-92 (2d Cir.1969), *cert. denied*, 397 U.S. 989, 90 S.Ct. 1121, 25 L.Ed.2d 396 (1970). Finally, because the award of prejudgment interest is compensatory rather than punitive, the award must be "tempered by an assessment of the equities." *Id.* at 1191. It is apparent to us that the factors relied upon by the district court are precisely the sorts of equitable considerations which should be evaluated in making a prejudgment interest award. Therefore, we cannot conclude that the district court abused its discretion in awarding the Osternecks only $945,512.85 in prejudgment interest.

For the reasons stated in the foregoing analysis, the federal securities judgment in the amount of $2,632,234 entered in favor of the plaintiffs and against Barwick Industries, Kellar and Talley with prejudgment interest in the amount of $945,512.85 is, in all respects, affirmed.[31]

III. CONCLUSION

In sum, the appeals in Case Nos. 85-8165 and 85-8523 are DISMISSED for want of appellate jurisdiction. The judgment in Case No. 85-8593 is AFFIRMED.

AFFIRMED in part, and appeals DISMISSED in part.

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31. The federal securities judgment which we affirm includes prejudgment interest. Thus, the total award received by the Osternecks on their federal claim exceeds the amount they were awarded based upon their state common law fraud judgment. Consequently, because a second recovery on the state law claims would not be possible, we need not address any issues presented by the challenge to the state law judgment and we expressly decline to decide them. However, see *supra* note 24.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-8165

MYLES OSTERNECK, et al.,
Plaintiffs-Appellants,
Cross-Appellees,

versus

E.T. BARWICK INDUSTRIES,
Defendant,

E.T. BARWICK,
Defendant,

M.E. KELLAR,
Defendant-Appellant,
Cross-Appellee,

BUFORD TALLEY,
Defendant-Appellant,
Cross-Appellee,

ERNST & WHINNEY,
Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion August 31, 11 Cir., 1987, — F.2d —)
(Filed October 19, 1987)

Before HATCHETT and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:
/s/ R. L. Anderson
United States Circuit Judge

ORD-42

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 85-8165

MYLES OSTERNECK, et al.,

Plaintiffs/Appellants,

v.

EUGENE BARWICK and ERNST & WHINNEY,

Defendants/Appellees,

B.A. TALLEY, M.E. KELLAR, and
E.T. BARWICK INDUSTRIES, INC.,

Defendants/Appellants,

v.

MYLES OSTERNECK, et al.,

Plaintiffs/Appellees/
Cross-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF GEORGIA

STIPULATION OF DEFENDANT/APPELLANTS
KELLAR AND TALLEY THAT PLAINTIFFS'
MARCH 15, 1985 NOTICE OF CROSS-APPEAL
WAS TIMELY FILED AND THAT THIS
COURT HAS JURISDICTION

It is the position of Defendant/Appellants Buford A. Talley ("Talley") and M.E. Kellar ("Kellar") that the Cross-Appeal filed by the Plaintiffs/Appellees/Cross-Appellants (the "Osternecks") on March 15, 1985 in the above-styled action was timely filed in accordance with the Federal Rules of Appellate Procedure. Defendant/

Appellants Talley and Kellar do not object to and stipulate that this Court has jurisdiction of the Cross-Appeal filed by the Osternecks on March 15, 1985.

This 6th day of May, 1985.

STIPULATED TO BY:

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M. E. Kellar

No. 87-1201

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,
Plaintiffs-Petitioners,

v.

ERNST & WHINNEY,
Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a post-judgment motion filed within the ten days prescribed by Fed. R. Civ. P. 59(e), and which seeks to change the original judgment by adding discretionary prejudgment interest to the amount of plaintiffs' recovery on federal securities claims, a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e)?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners Myles Osterneck, Guy-Kenneth Osterneck, and Myles Osterneck and Guy-Kenneth Osterneck as Trustees for the Benefit of Robert Osterneck (Plaintiffs-Appellants); E. T. Barwick Industries, Inc., M. E. Kellar, B. A. Talley (Defendants-Cross Appellants); Eugene Barwick (Defendant-Appellee); and Respondent Ernst & Whinney (Defendant-Appellee).

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No. 87-1201

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,
Plaintiffs-Petitioners,

v.

ERNST & WHINNEY,
Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Ernst & Whinney respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Eleventh Circuit's opinion which dismissed Petitioners' appeal in this case for lack of jurisdiction.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Osterneck v. E.T. Barwick Industries, Inc.*, 825 F.2d 1521 (11th Cir. 1987), and is set forth in Petitioners' Appendix at 15.

The original judgment on the merits in the District Court is set forth in Petitioners' Appendix at 4.

Petitioners' motion for discretionary prejudgment interest and brief in support are set forth in the Appendix hereto ("Respondent's Appendix") at 1.

The order of the District Court awarding Petitioners prejudgment interest and amending the original judgment to reflect this additional award is set forth in Petitioners' Appendix at 8.

The Amended Judgment is set forth in Petitioners' Appendix at 14.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on August 31, 1987. Rehearing and rehearing in banc were denied on October 19, 1987. Petitioners purport to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

Rule 59(e) of the Federal Rules of Civil Procedure:

> Motion to Alter or Amend a Judgment.
>
> A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 4(a)(4) of the Federal Rules of Appellate Procedure:

> (a) Appeals in Civil Cases.
>
> . . . .
>
> (4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

STATEMENT OF THE CASE

This securities fraud case arose out of the September 8, 1969 merger of Cavalier Bag Company ("Cavalier"), a corporation owned by Petitioners, into E. T. Barwick Industries, Inc. ("Barwick Industries"). Pursuant to the merger, Petitioners exchanged their stock in Cavalier for stock in Barwick Industries. In agreeing to the exchange, Petitioners allegedly relied on Barwick Industries' audited financial statements for the two years preceding the merger. Respondent Ernst & Whinney ("E&W"), the independent certified public accountants for Barwick Industries, audited those financial statements.

Almost six years after the merger, on September 4, 1975, Petitioners filed this action alleging violations of Sections 10(b) and 20 of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78j(b), 78t), Rule 10b-5 thereunder (17 C.F.R. § 240.10b-5), and the common law of Georgia.

Following almost ten years of pre-trial proceedings, this case went to trial in October, 1984, against Barwick Industries; E. T. Barwick, B. A. Talley and M. E. Kellar, who were directors and officers of Barwick Industries prior to or during the merger; and E&W. After a three and one-half month jury trial, a verdict was returned in favor of E&W and E. T. Barwick, individually. However, the jury found in favor of Petitioners against defendants Barwick Industries, Talley and Kellar in an amount exceeding $2.6 million as compensatory damages for their violations of federal securities laws and Georgia common law.

The original judgment was entered on January 30, 1985. Within the ten-day time limit prescribed by Fed. R. Civ. P. 59(e), Petitioners filed and served a motion for prejudgment interest computed from September 8,

1969, the date of the merger. While that motion was pending, Petitioners filed a notice of appeal and two notices of cross-appeal from the January 30, 1985 judgment.

On July 1, 1985, the District Court entered its order on Petitioners' motion, awarding them over $945,000 in prejudgment interest as a part of compensatory damages and ordering that the original judgment be "AMENDED" to reflect this additional award. The Amended Judgment was entered on July 9, 1985.

Petitioners failed to appeal from the Amended Judgment as to Respondent E&W. The Eleventh Circuit held that Petitioners' motion for prejudgment interest was a Rule 59(e) motion to alter or amend the original judgment. Therefore, the notices of appeal filed while the Rule 59(e) motion was pending had no effect. *See* Fed. R. App. P. 4(a)(4). Accordingly, the Eleventh Circuit dismissed Petitioners' appeal as to Respondent E&W for lack of jurisdiction.

At the time the Eleventh Circuit rendered its decision, there was pending in the District Court Petitioners' motion for an extension of time in which to file their appeal as to E&W. The District Court had deferred ruling on that motion pending the Eleventh Circuit's decision. *See Osterneck,* 825 F.2d at 1528 n.12. The Eleventh Circuit expressly noted that "[f]ollowing this dismissal, the district court may entertain the Osternecks' motion." *Id.*

The District Court later denied the motion, concluding that Petitioners had not carried their burden of showing excusable neglect as required by Fed. R. App. P. 4(a)(5). Inexplicably, Petitioners failed to appeal that denial to the Eleventh Circuit. Had they done so, and had the Court of Appeals reversed, their petition would not be before this Court.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OR THIS COURT.

The Eleventh Circuit held that a post-judgment motion which is filed within the ten days prescribed by Rule 59(e), and which seeks to add discretionary prejudgment interest to plaintiffs' recovery on federal securities law claims, is a Rule 59(e) motion to alter or amend the original judgment. Contrary to Petitioners' suggestion, that holding does not conflict with this Court's "definition of a Rule 59(e) motion" in *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445 (1982), the Ninth Circuit's opinion in *Jenkins v. Whittaker Corp.*, 785 F.2d 720 (9th Cir.), *cert. denied*, ___ U.S. ___, 107 S. Ct. 324 (1986), or the Fifth Circuit's "approach to Rule 59(e)" in *Harcon Barge Co. v. D&G Boat Rentals, Inc.*, 784 F.2d 665 (5th Cir.) (in banc), *cert. denied sub nom. Southern Pac. Transp. Co. v. Harcon Barge Co.*, ___ U.S. ___, 107 S. Ct. 398 (1986).

In *White*, this Court held that a post-judgment request for an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, is not a motion to alter or amend the judgment subject to the ten-day timeliness standard of Rule 59(e). The Court reasoned as follows:

> [T]he federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits. By contrast, a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action — issues to which Rule 59(e) was never intended to apply.

> . . . Unlike other judicial relief, the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial.
>
> . . . "[A] motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e)."

455 U.S. at 451-52 (citations and footnote omitted). [1]

The Eleventh Circuit's decision is consistent with *White* because factors supporting the "collateral" nature of the Section 1988 attorney's fee request in *White* are absent here. First, the request for prejudgment interest in this case did imply a change in the original judgment. *Osterneck*, 825 F.2d at 1526 (Petitioners' motion "requests a substantive alteration of a court's judgment"). Indeed, Petitioners' motion resulted in an "Amended Judgment." Second, the award of prejudgment interest in this case was not "uniquely separable" from the decision on the merits because it constituted an element of compensation for the injury giving rise to the action. The Eleventh Circuit recognized that in federal securities cases "prejudgment interest is compensation which directly stems from the injury giving

[1] The Court in *White* specifically acknowledged precedents holding that the issue of attorney's fees in civil rights cases was so independent of the merits action as to support a separate federal action " 'solely to obtain an award of attorney's fees' " for legal work done in prior proceedings. 455 U.S. at 451 n.13 (quoting *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 66 (1980)).

rise to the action." *Id.* The District Court also noted that in federal securities cases "prejudgment interest is a part of compensatory damages" to be " 'tempered by an assessment of the equities' " [2] (Petitioners' Appendix at 10 (citation omitted)). Those "equities" are determined by factors inseparable from the merits, including the degree of personal wrongdoing on the part of the defendant and whether the award of prejudgment interest would in fact be compensatory. *See, e.g., Wolf v. Frank*, 477 F.2d 467, 479 (5th Cir.), *cert. denied*, 414 U.S. 975 (1973); *City Nat'l Bank v. American Commonwealth Fin. Corp.*, 608 F. Supp. 941, 943 (W.D.N.C. 1985), *aff'd*, 801 F.2d 714 (4th Cir. 1986), *cert. denied sub nom. Great Commonwealth Life Ins. Co. v. Branch Bank & Trust Co.*, ___ U.S. ___, 107 S. Ct. 1301 (1987). Thus, there is no conflict between the Eleventh Circuit's opinion and *White's* "definition of a Rule 59(e) motion."

Petitioners are unable to cite, and Respondent is unaware of, a single decision holding that an award of prejudgment interest for a violation of federal securities law is collateral to the merits or outside Rule 59(e). The Ninth Circuit's opinion in *Jenkins* involved the award of prejudgment interest in a wrongful death action governed by Hawaii law. In concluding that prejudgment interest was not compensation for the injury giving rise to that particular action, the Ninth Circuit relied upon a decision of the Hawaii courts. *Jenkins*, 785 F.2d at 737. This application of local law does not

[2] Petitioners represented to the District Court that an award of prejudgment interest "would in fact be compensatory" and was "the only way" to make them whole. Brief in Support of Plaintiffs' Motion for Award of Prejudgment Interest (Respondent's Appendix at 8-10, 14 & 15).

present a conflict with a decision of the Eleventh Circuit "on the same matter." *Cf.* Sup. Ct. R. 17.1(a).

The Fifth Circuit's decision in *Harcon Barge* did not even involve a motion for prejudgment interest. It concerned a motion to amend a judgment to delete an award of costs, which the Fifth Circuit quite properly deemed a "motion to alter or amend the judgment" within Rule 59(e). *Harcon Barge*, 784 F.2d at 667. Regardless of the parameters of its "bright-line" test, *Harcon Barge* provides no support for the proposition that prejudgment interest is a "collateral" matter outside Rule 59(e).

II. PETITIONERS FAIL TO COME WITHIN THE "UNIQUE CIRCUMSTANCES" EXCEPTION TO THE REQUIREMENT OF A TIMELY APPEAL.

Petitioners also contend that the Eleventh Circuit's opinion conflicts with this Court's holding in *Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384 (1964). To create this "conflict," Petitioners misstate the holding in *Thompson* and ignore the factual distinctions between *Thompson* and this case.

In *Thompson*, the petitioner served a motion for new trial within ten days after receipt of notice of entry of judgment, but twelve days after entry of judgment. The "trial court specifically declared that 'the motion for a new trial' was made 'in ample time.'" *Id.* at 384. In reliance on that statement, petitioner did not appeal from the original judgment, but timely appealed from the denial of the new trial motion. The court of appeals dismissed the appeal on the grounds that notice of appeal had not been filed within the time required after the entry of the original judgment, and that the new trial motion was untimely and, therefore, did not toll the running of the time for appeal.

This Court developed the "unique circumstances" exception to the requirement of a timely appeal. Under that exception "an appellate court may and should hear an appeal even though it is not timely, if the appellant reasonably relied on an erroneous statement of the district court that the appeal . . . was timely, and the appeal would have been timely if the district court had been correct." *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 111 n.2 (7th Cir. 1985).

Petitioners herein cannot demonstrate the "unique circumstances" required by *Thompson*. Neither the

District Court nor the Eleventh Circuit ever affirmatively represented to Petitioners that their appeal was timely. *Osterneck*, 825 F.2d at 1528.

With respect to Petitioners' purported reliance on the actions of the District Court, the Eleventh Circuit stated:

> Moreover, to the extent the Osternecks may have erroneously relied upon the actions of the district court, they did so despite the district court's express statements that the judgment would have to be "amended" to include prejudgment interest. *See* Record on Appeal, vol. 82 at 8497 ("if prejudgment interest is granted it will be — the judgment can be amended"); *cf. id.* vol. 24, Tab 508 (entering "amended judgment" awarding prejudgment interest). Rule 59(e) is, of course, the only vehicle by which prior district court judgments may be "amended."

Id. at 1528 n.11.

The Eleventh Circuit correctly applied the *Thompson* holding to the facts of this case and found that Petitioners failed to demonstrate the "unique circumstances" required to exercise jurisdiction over an untimely appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: Atlanta, Georgia
February 16, 1988

Respectfully submitted,

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IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

MYLES OSTERNECK, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	FILE NO. C75-1728A
E. T. BARWICK INDUSTRIES, INC., et al.,	)	
	)	
	)	
Defendents.	)	

PLAINTIFFS' MOTION FOR AWARD OF PREJUDGMENT INTEREST

COME NOW Plaintiffs, Myles Osterneck, Guy-Kenneth Osterneck and Robert Osterneck and Myles Osterneck and Guy-Kenneth Osterneck as Trustees for the Benefit of Robert Osterneck (hereinafter "Plaintiffs") and move the Court for an award of prejudgment interest from September 8, 1969 to the date of Judgment, January 30, 1985, against Defendants E. T. Barwick Industries, Inc., Melvin E. Kellar and Buford A. Talley, and respectfully show the Court the following:

1.

On January 30, 1985 a Verdict and Judgment in favor of Plaintiffs was filed and entered in the above-styled action and against Defendants E. T. Barwick Industries, Inc., M. E. Kellar and B. A. Talley on their Federal Securities Claims and State of Georgia com-

mon law and statutory fraud claims in the amount of Two Million, Six Hundred Thirty-Two Thousand, Two Hundred Thirty-Four Dollars ($2,632,234.00) as compensatory damages.

2.

Pursuant to the instructions of the Court given to the jury, the amount of the compensatory damages awarded to Plaintiffs was based on their damages as of the date of the Merger Agreement which is September 8, 1969.

3.

The grounds and authority for the award of prejudgment interest to Plaintiffs and the appropriate amount of interest are provided in Plaintiffs' accompanying Brief in support of its Motion for an award of prejudgment interest concurrently filed herewith.

4.

Plaintiffs also submit in support of their Motion for an award of prejudgment interest an Affidavit of Walter M. Singer with exhibits which is currently filed herewith.

WHEREFORE, for the reasons contained in Plaintiffs' Brief and the Affidavit of Walter M. Singer, Plaintiffs respectfully request that this Court award it prejudgment interest from September 8, 1969 to the date of the Judgment.

Respectfully submitted,

/s/
PAUL WEBB, JR.
Georgia State Bar No. 744650

/s/
HAROLD T. DANIEL, JR.
Georgia State Bar No. 204000

/s/
KEITH M. WIENER
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Attorneys for Plaintiffs

Of Counsel:
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a true and correct copy of the foregoing Plaintiffs' Motion for Award of Pre-Judgment Interest to all counsel of record by depositing a copy of same in the United States mail, with adequate postage affixed thereto, addressed as follows:

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This 11 day of February, 1985.

/s/
KEITH M. WIENER
Georgia State Bar No. 757475
Attorney for Plaintiffs

IN THE

United States District Court
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
	)	
v.	)	
	)	FILE NO. C75-1728A
E. T. BARWICK INDUSTRIES, INC., et al.,	)	
	)	
Defendents.	)	

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR AWARD OF PREJUDGMENT INTEREST

INTRODUCTION

Plaintiffs filed their Complaint in the above-referenced action on September 4, 1975. The trial of this case began on October 15, 1984 and ended with a verdict and judgment on January 30, 1985.

The verdict and judgment rendered by the jury was in favor of the Plaintiffs and against Defendants E. T. Barwick Industries, Inc., M. E. Kellar and B. A. Talley (hereinafter "Defendants") on the Federal Securities claims and the Georgia common law and statutory fraud claims in the amount of Two Million, Six Hundred Thirty-Two Thousand, Two Hundred Thirty-Four Dollars ($2,632,234.00) as compensatory damages. This verdict and judgment was filed and entered in the Clerk's office on January 30, 1985.

Pursuant to the Court's instructions given to the jury, the amount of compensatory damages was determined as of the date of the Merger Agreement entered into between Plaintiffs and Defendant E. T. Barwick Industries, Inc. That date is September 8, 1969. Thus, pursuant to the Court's instructions, the amount of $2,632,234.00 as compensatory damages is the amount of damages the Plaintiffs suffered on September 8, 1969.

Plaintiffs have filed concurrently herewith their Motion for an award of prejudgment interest at the request of the Court. Plaintiffs submit this Brief in support of their Motion. Plaintiffs also submit in support of their Motion an Affidavit of Walter M. Singer concurrently filed herewith, containing the calculations of an appropriate award of prejudgment interest.

ARGUMENT AND CITATIONS OF AUTHORITIES

1. PLAINTIFFS ARE ENTITLED TO AN AWARD OF PREJUDGEMENT INTEREST FROM SEPTEMBER 8, 1969 TO THE DATE OF JUDGMENT

It is well-established that in the absence of a statutory provision, the award of prejudgment interest lies within the discretion of the Court, including cases involving Federal Securities law and state common law fraud claims. *E.g., Blau v. Lehman*, 368 U.S. 403, 414, 82 S.Ct. 451, 457, 7 L.Ed.2d 403, 411 (1962); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 560 (5th Cir. 1981), *aff'd in part & rev'd in part on other grounds*, ___ U.S. ___, 103 S. Ct. 683, 74 L.Ed.2d 548 (1983) (Federal Securities claim, §10(b) and Rule 10b-5 case); *Hembree v. Georgia Power Company*, 637 F.2d 423, 430 (5th Cir. 1981); *Payne v. Panama Canal Company*, 607 F.2d 155,

166 (5th Cir. 1979); *West v. Harris*, 573 F.2d 873, 883 (5th Cir. 1978), *cert. denied*, 440 U.S. 946, 99 S.Ct. 1424, 59 L.Ed.2d 635 (1979); *Wolf v. Frank*, 477 F.2d 467 (5th Cir.), *cert. denied*, 414 U.S. 975, 94 S.Ct. 287, 38 L.Ed.2d 218 (1973) (federal securities claim under Rule 10b-5); *George R. Hall, Inc. v. Superior Trucking Company, Inc.*, 532 F.Supp. 985, 997-998 (N.D. Ga. 1982).

This well-established rule is universally applied by other jurisdictions. *E.g., Sharp v. Coopers & Lybrand*, 649 F.2d 175, 192-193 (3d Cir. 1981) (appropriate to award prejudgment interest in §10(b) and Rule 10b-5 case); *Rolf v. Blyth Eastman Dillon & Co., Inc.*, 570 F.2d 38, 50 (2d Cir. 1978) (appropriate to award prejudgment interest in §10(b) and Rule 10b-5 case); *Holmes v. Bateson*, 583 F.2d 542, 564 (1st Cir. 1978) (appropriate to award prejudgment interest in §10(b) and Rule 10b-5 case); *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1051 (7th Cir. 1977) (appropriate to award prejudgment interest in §10(b) and Rule 10b-5 merger case from the date of merger agreement to the date of judgment); *Occidental Life Insurance Co. v. Pat Ryan & Associates, Inc.*, 496 F.2d 1255, 1268-1269 (4th Cir.), *cert. denied*, 419 U.S. 1023, 95 S.Ct. 499, 42 L.Ed.2d 297 (1974) (appropriate to award prejudgment interest especially in §10(b) and Rule 10b-5 case); *Wessel v. Buhler*, 437 F.2d 279, 284 (9th Cir. 1971); *Norte & Company v. Huffines*, 416 F.2d 1189, 1191, 1192 (2d Cir. 1969), *cert. denied sub nom*, 397 U.S. 989, 90 S.Ct. 1121, 25 L.Ed.2d 396 (1970); *Freschi v. Grand Coal Venture*, 588 F.2d 1257, 1260 (S.D.N.Y. 1984) (appropriate to award prejudgment interest in a Federal Securities fraud case involving §10(b) and Rule 10b-5); *Western Federal Corporation v. Davis*, 553 F.Supp. 818 (D. Ariz. 1982) *aff'd*, 739 F.2d 1439 (9th Cir. 1984) (appropriate to award prejudgment interest at the on-going commercial money market rate in a

Federal Securities fraud case involving §10(b) and Rule 10b-5); *Spatz v. Borenstein*, 513 F.Supp. 571, 584 (N.D. Ill. 1981) (appropriate to award prejudgment interest in a Federal Securities fraud case involving §10(b) and Rule 10b-5); *Blasdel v. Mullenix*, 356 F.Supp. 924, 928 (W.D. Okla. 1971) (appropriate to award prejudgment interest in a Federal Securities fraud case involving §10(b) and Rule 10b-5); *Johns Hopkins University v. Hutton*, 297 F.Supp. 1165, 1227-1230, 1233 (D. Md. 1968), *aff'd in part & rev'd in part on other grounds*, 422 F.2d 1124 (4th Cir. 1970) (appropriate to award prejudgment interest in Federal Securities fraud case involving §10(b) and Rule 10b-5).

II. THE FACTORS TO BE APPLIED IN DETERMINING AN APPROPRIATE AWARD OF PREJUDGMENT INTEREST

In determining whether to award prejudgment interest, the major factor permeating cases in which prejudgment interest has been allowed is the necessity to compensate an injured plaintiff, and the courts recognize that "the only way the wronged party can be made whole is to award him [prejudgment] interest from the time he should have received the money." *E.g.*, *Hembree v. Georgia Power Company*, 637 F.2d 423, 430 (5th Cir. 1981), *quoting Louisiana & Arkansas Railway v. Export Drum Co.*, 359 F.2d 311, 317 (5th Cir. 1966); *Payne v. Panama Canal Company*, 607 F.2d 155, 166 (5th Cir. 1979); *West v. Harris*, 573 F.2d 873, 883 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979); *George R. Hall, Inc. v. Superior Trucking Co.*, 532 F.Supp. 985, 997-998 (N.D. Ga. 1982).

The general rule in this Circuit, that the only way the wronged party can be made whole is to award him prejudgment interest from the time he should have

received the money on the date of the purchase or sale, is based on the principal that at the conclusion of the litigation the parties should be in the same position they occupied at the time of the transaction which lead to the litigation. *E.g.*, *Hembree*, *supra*, 637 F.2d at 430; *Payne*, *supra*, 607 F.2d at 166; *West*, *supra*, 573 F.2d at 882-883; *Louisiana & Arkansas Railway Co.*, *supra*, 359 F.2d at 317; *George R. Hall Company, Inc.*, *supra*, 532 F.Supp. at 997-998.

The federal standard applied in determining an award of prejudgment interest in §10(b) and Rule 10b-5 cases "is one of fairness" and a balancing of the equities. *Huddleston*, *supra*, 640 F.2d at 560 and cases cited in fn. 48 of the opinion; *Balan v. Lehman*, 368 U.S. 403, 82 S.Ct. 451, 457; *Sharp v. Coopers & Lybrand*, *supra*, 649 F.2d at 193; *West*, *supra*, 573 F.2d at 883; *Norte & Co.*, 416 F.2d at 1191; *Wessel*, *supra*, 437 F.2d at 284; *Wilsmann v. The Upjohn Co.*, 572 F.Supp. 242, 245 (W.D. Mich. 1983) (allowed an award of prejudgment interest in Federal Securities fraud case involving §10(b) and Rule 10b-5 case).

In considering the fairness to the plaintiff for an award of prejudgment interest, the courts focus on awarding the plaintiff an amount to compensate him *for the value of the lost use of his money. E.g.*, *see* cases previously cited for the proposition that the only way to make the plaintiff whole is to award him prejudgment interest from the time he should have received the money cited above; *Kris-Kraft Industries, Inc. v. Piper Aircraft Corp.*, 516 F.2d 172, 191 (2d Cir. 1975), *rev'd on other grounds*, 430 U.S. 1, 97 S.Ct. 926 (1977) (an award of prejudgment interest should compensate the plaintiff for the lost use of his money); *Freschi v. Grand Coal Venture*, *supra*, 588 F.Supp. at 1261 (award of prejudgment interest should compensate a plaintiff for

the lost use of his money); *Western Federal Corp. v. Davis, supra*, 553 F.Supp. at 821 *aff'd* (award of prejudgment interest at the commercial money market rate in an effort to compensate the plaintiffs for the loss of the use of their money); *George R. Hall, Inc., supra*, 532 F.Supp. at 997 (the court held it was impossible to say that a plaintiff had been made whole if it was merely paid back the costs of its 1979 repairs in inflated 1982 dollars without any prejudgment interest); *Johns Hopkins University v. Hutton*, 297 F.Supp. 1165, 1228 (D.C. Md. 1968), *aff'd in part & rev'd in part on other grounds*, 422 F.2d 1124 (4th Cir. 1970), *cert. denied*, 416 U.S. 916 (1974) (rate of prejudgment interest awarded should "compensate fairly the defrauded purchaser for the loss of the use of his money", 297 F.Supp. at 1229); *see Collier v. Granger*, 258 F.Supp. 717 (S.D.N.Y. 1966).

Other factors and standards which federal courts use in determining whether or not to grant prejudgment interest in a §10(b) and Rule 10b-5 case include the degree of personal wrongdoing on the part of the Defendants, whether the prejudgment interest would be compensatory in nature, whether Plaintiffs passed up other, reasonably available and attractive opportunities, whether the Plaintiffs intentionally prolonged the time between the occurance of the violation and the award of the Judgment or whether the Defendants were at least equally if not more responsible for the delay. *E.g., Norte & Co. v. Huffines*, 416 F.2d 1189, 1191-1192 (2d Cir. 1969); *Wilsmann v. The Upjohn Company*, 572 F.Supp. 242, 245 (W.D. Mich. 1983); *Western Federal Corporation v. Davis*, 553 F.Supp. 818, 821 (D. Ariz. 1982), *aff'd*, 739 F.2d 1439 (9th Cir. 1984); *Johns Hopkins University v. Hutton*, 297 F.Supp. 1165, 1227-1230, 1233 (D. Md. 1968), *aff'd & rev'd in part on other grounds*, 422 F.2d 1124 (4th Cir. 1970); *see* cases cited *supra* holding that considerations of fairness must

be reviewed and that the only way to make a plaintiff whole is to award him prejudgment interest for the lost use of his money; *see Huddleston v. Hermon & MacLean*, 640 F.2d 534, 560 and cases cited in fn. 48 (5th Cir. 1981), *aff'd in part & rev'd in part on other grounds*, ____ U.S. ____, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983).

Turning to the facts in this case, an award of prejudgment interest clearly is fair under any analysis or considerations of fairness. The jury has found that the Defendants E. T. Barwick Industries, Inc., M. E. Kellar and B. A. Talley violated Federal Securities laws and statutory and common law fraud against the Plaintiffs and, as a result of their actions and conduct, Plaintiffs sold their family business which was their primary if not their sole asset, on terms which they would not have accepted but for such conduct and actions on the part of these Defendants.

It is clear that if the Plaintiffs had been informed of what the jury has found to be the truth concerning the inaccuracy of the financial statements and financial condition of E. T. Barwick Industries, Inc., they would not have entered into the Merger Agreement. The jury awarded damages pursuant to the Court's instructions as of the date of the merger, September 8, 1969.The Plaintiffs have lost the use of that money since September 1969. Thus, the degree of personal wrongdoing on the part of these Defendants has been established, and fundamental considerations of fairness dictate an award of prejudgment interest be provided to the Plaintiffs.

The uncontradicted testimony at trial established that there was available substantial and reasonable alternative investment opportunities to the Plaintiffs prior to their entering the merger with E. T. Barwick

Industries, Inc. [Trial Testimony of: Eric Blum, Kenneth Chasser, Myles Osterneck, and Guy Osterneck]. Therefore, there can be no doubt that the Plaintiffs passed up other, reasonably available and attractive opportunities to enter into this Merger Agreement and purchase stock of E. T. Barwick Industries, Inc. in exchange for the stock and assets of their family business, Cavalier Bag Company.

The Merger Agreement occurred on September 8, 1969. This case, instituted on September 4, 1975, did not come to trial for over nine (9) years. The trial in this case began on October 15, 1984. The delays involved in this complicated case, complicated both in terms of fact and law, cannot be laid on the doorstep of the Plaintiffs. In fact, the record in this case clearly demonstrates that the fault for the delay in bringing this case to trial lies squarely on the Defendants. Even a cursory review of the voluminous docket sheet filed in this case demonstrates this fact. The Defendants filed numerous motions including several motions for reconsideration attempting to end this case before going to trial.

For example, the Defendants filed motions to dismiss or for judgment on the pleadings. After the Court in May 1978 denied the motions of the Defendants for judgment on the pleadings or to dismiss, the Defendants filed in June of 1978 a Motion for Reconsideration of the Judge's May, 1978 Order and again sought dismissal or judgment on the pleadings. Subsequent to the Court's Order in September 1978 denying Defendants' Motion for Reconsideration, the Defendants filed a motion for a separate trial on the statute of limitations issue in October, 1978. After the Court entered its Order denying the request for a separate trial, the Defendants filed in 1980 motions to dismiss or in the alternative for summary judgment.

Subsequent to the Court's Order in December 1981 denying the Defendants' motions for summary judgment, the Defendants filed in August of 1982 another Motion to Dismiss or in the Alternative for a Stay of the Proceedings. The Court in April of 1983 entered an Order denying Defendants' Motion to Dismiss or in the Alternative for An Order to Stay of the Proceedings. After this Order the Defendants in October of 1983 filed a Motion for Reconsideration of the Court's Order denying them a separate trial on the issue of the statute of limitations. Defendants also filed in October 1983 another Motion for Reconsideration (the second Motion for Reconsideration) to reconsider the Court's Order denying summary judgment on the statute of limitations issue. This Court in February of 1984 entered its Order denying the Defendants' second Motion for Reconsideration of the statutue of limitations issue and summary judgment, and entered its Order denying Defendant's Motion for Reconsideration of a separate trial on the statue of limitations issue.

Plaintiffs will not go through in detail the prior history of this case, which the Plaintiffs are confident the Court is well aware. There can be no doubt after reviewing the record of this case that the delay in bringing this case to trial is not the fault of the Plaintiffs, and clearly lies at the doorstep of the Defendants.

Another consideration which the courts apply in weighing the issue of prejudgment interest is to take judicial notice of the decline in the purchasing value of the dollar since the acts complained of occurred as a result of inflation. Federal Rule of Evidence 201. There, of course, can be no argument as to the decline of the purchasing value of the dollar since September of 1969 as the result of inflation, and this Court may and should take judicial notice of this fact when it determines the appropriateness of an award of prejudgment interest

and the amount of prejudgment interest. It must be remembered that the $2.6 Million award to the Plaintiffs is for damages as of the date of the merger in September 1969.

It also is clear that the Plaintiffs were deprived of the principal sum they have been awarded as damages for fifteen (15) years, and thus prejudgment interest would in fact be compensatory.

In determining whether to award prejudgment interest to the Plaintiffs, the following fact should be considered:

> The jury's verdict necessarily included a finding that the defendants committed a fraud upon the plaintiff. As a result of this fraud, the plaintiff was deprived of the use of his money, and the defendants and the benefit of their fraud, for many years. *See, e.g., Holmes v. Bateson*, 583 F.2d 542, 564 (1st Cir. 1978). The plaintiff, therefore, *can only be made whole if prejudgment interest is awarded to him.*

Wilsmann v. Upjohn Company, supra, 572 F.Supp. at 245 (emphasis added and in original).

In *Norte & Company, supra*, 416 F.2d 1189, 1191 (2d Cir.) the court stated as follows:

> However, as the corporation had been deprived of almost $3,000,000, the difference between the fair value of the stock issued and what it actually received, through the calculated fraud of the defendants, there was good reason for the district court to award interest as compensatory damages.

Norte & Company v. Huffines, supra, 416 F.2d at 1191.

In *Cant v. A. G. Becker & Co., Inc.*, 384 F.Supp. 814 (N.D. Ill. 1974), the court in a Federal Securities fraud case stated it this way:

> "However, in light of a recent decision by the Court of Appeals of the Seventh Circuit and other decisions by federal courts in securities cases, *it is now clear that prejudgment interest may be awarded in situations wherein through the fault of another the plaintiff was deprived of beneficial use of its funds.*" (Citations omitted).
>
> As Judge Cummings stated in *Mattigan (Mattigan, Inc. v. Goodman*, 498 F.2d 233 (7th Cir. 1974): "Had plaintiffs not purchased the Fidelity stock, or purchased at a lower price, *they would have put the unused money somewhere, even if only in a savings account.* Unlike the non-existence profits and division as a result of defendants' misrepresentations, *the chance to use their money elsewhere was actually lost to plaintiffs. . . .*"

Cant, supra, 384 F.Supp. at 815-816 (emphasis added) *quoting in part Mattigan, Inc., supra*, 498 F.2d at 240. The court in *Cant* like the other Federal Securities cases, awarded prejudgment interest to the plaintiffs assessed from the date of the purchase and thereafter on the aggregate loss incurred to the date of judgment. 384 F.Supp. at 816; *see* cases cited *supra*. The court pointed out:

> The defendant was found to be the "wrongdoer" in a series of stock transactions which were the subject of the litigation. A. G. Becker & Company, Inc. had the use of the plaintiff's funds for an extended period of time.

384 F.Supp. at 816.

As well stated by the court in *Cant*:

> In lieu of rescission the Court still feels that plaintiff is entitled to an award of monetary damages sufficient to place him in the position he would

have been had it not been for defendant's wrongful activity. Allowing damages, interest, and costs restores plaintiff to that position. *Plaintiff can only be made whole if placed in a posture which assumes that he had the opportunity to utilize his funds in a reasonable manner. The law does not permit defendants to obtain the beneficial use of plaintiff's funds at no cost to the wrongdoer.*

Cant, supra, 484 F.Supp. at 816 (emphasis added).

III. THE APPROPRIATE AWARD OF PREJUDGMENT INTEREST TO THE PLAINTIFFS

In determining the appropriate award of prejudgment interest to the Plaintiffs, the federal courts have recognized that they may award interest applying commercial market rates in order to compensate the Plaintiffs for the loss of the use of their money. In *Western Federal Corporation v. Davis, supra*, the court in a Federal Securities claim case stated the following:

> In light of the fact that the defendants violated the securities laws and that the plaintiffs have been deprived of the full use of the amounts paid, plaintiffs are entitled to recover prejudgment interest.

553 F.Supp. at 821. The court in *Western Federal* concluded that the appropriate rate of prejudgment interest to award the plaintiffs was based on the average rate that a consumer could have obtained in the money market during the two-year period in question. 553 F.Supp. at 821.

The court stated the following:

> *This Court recognizes that it may award interest at the money market rate in an effort to compensate the plaintiffs for the loss of the use of their money. See Johns Hopkins University v. Hutton*, 297 F.Supp. 1165, 1228 (citation omitted).

553 F.Supp. at 821 (emphasis added). The court pointed out that since the Federal Securities Act did not prescribe a legal rate of interest, "it has been ruled that the rate of interest imposed should *'compensate fairly the defrauded purchaser for the loss of the use of his money.'* " *Western Federal Corporation, supra*, 553 F.Supp. at 821 (emphasis added), *quoting Johns Hopkins University v. Hutton*, 297 F.Supp. at 1229; *see Collier v. Granger*, 258 F.Supp. 717 (S.D.N.Y. 1966).

In *Johns Hopkins University v. Hutton*, 297 F.Supp. 1165 (D. Md. 1968), *aff'd in part & rev'd in part on other grounds*, 422 F.2d 1124 (4th Cir. 1970), *cert. denied*, 416 U.S. 916 (1974), the court approved an award of prejudgment interest in a Federal Securities claim case and recognized the commercial money market as appropriate to consider in determining the rate of prejudgment interest. In *Johns Hopkins* the Court rejected an automatic application of the legal rate of interest used by the state statute. After noting that prejudgment interest is used to compensate fairly the defrauded purchaser "for the loss of the use of his money", the court stated the following:

> *The comparative states of the money market at the times of purchase and of rescission are important factors in determining a compensatory rate of interest.* [Citations omitted].

The court in *Johns Hopkins* took judicial notice of the data submitted concerning the prime interest rates during the period from the time of the acts complained of until the date of judgment. 297 F.Supp. at 1230. *The*

court reviewed and analyzed the prime rate as demonstrating the reasonable level of return for a similar type of investment as made by the plaintiffs in that particular case. In *Johns Hopkins*, the court stated that the plaintiff was "an investor anticipating a return on its investment." 297 F.Supp. at 1229. In order to place the plaintiff in a position it would have been in were it not for the violations of the Federal Securities law of defendants "*an examination is required to determine what Hopkins [plaintiff] could reasonably have expected to earn by a similar type of investment.*" 297 F.Supp. at 1229 (emphasis added).

This is an approach used by many cases as cited in the *Johns Hopkins* decision, the *Western Federal Corporation* case and other cases cited *supra*. The Court in *Johns Hopkins* concluded that the plaintiffs could have reasonably expected to earn a certain percentage per annum on its investment from the time of the acts complained of until the date of judgment. 297 F.Supp. at 1230. The Court determined that since the purpose of awarding interest to the defrauded purchaser "is to compensate him for the amount which he could have safely earned by the use of his money," the choice of any date other than the date of which the fraudulent sale was made, "would amount to a decree of less than full compensation." 297 F.Supp. at 1233 and cases cited.

The Court in *Johns Hopkins* determined the appropriate rate of interest per annum based on what it believed plaintiffs could reasonably have expected as a return on the type of investment involved during that period of time, reviewing and analyzing the prime rate during the period of time, considering what the plaintiff could reasonably have expected to earn by a similar type of investment during that period of time, considering the contractual language involved in that case, and

determining an appropriate rate of interest as compensation for the loss of the use of the money the plaintiff should have received. 297 F.Supp. at 1227-1230, 1233, *aff'd*, 422 F.2d 1124 (9th Cir. 1970).

Thus, the federal courts clearly have recognized that the appropriate prejudgment interest imposed should "compensate fairly the defrauded purchaser for the loss of the use of his money," and that a court may award interest based on the commercial market rates and the prime rate in an effort to compensate the plaintiffs for the loss of the use of their money from the date of the acts complained of to the date of judgment.

Turning to the facts applicable in this case, Plaintiffs have concurrently filed herewith an Affidavit of Walter M. Singer with exhibits to provide the Court with interest rate calculations during the appropriate period of time from September 8, 1969 to the date of Judgment, January 30, 1985.

In determining the interest rate calculation for the period beginning September 8, 1969 to January 30, 1985, the principal amount used was $2,632,234 which is the amount of the Judgment entered in favor of the Plaintiffs in the above-styled action. The date of the entry of the Judgment is January 30, 1985. The beginning date for determining the calculations, September 8, 1969 is the date of the merger agreement entered into between the Plaintiffs and Defendant E. T. Barwick Industries, Inc. and the date upon which the $2,632,234.00 in compensatory damages was determined pursuant to the instructions of the Court.

The generally accepted and most appropriate method in determining interest rate calculations concerning the value of the use of money over a period of time for a similar type of investment as made by the Plaintiffs in this case is to apply the three-month Certificates of

Deposit interest rate calculations from September 8, 1969 to January 30, 1985 on a compounded interest basis. [Affidavit of Walter Singer at ¶¶6, 7 and 18]. This approach is the most appropriate in determining the proper rate of interest because the Plaintiffs, as testimony shows at the trial, intended as their goal a long-term growth investment and savings by their purchase of Barwick stock in exchange for the sale of Cavalier Bag Company. Based on this approach, the appropriate amount of interest from September 8, 1969 to January 30, 1985 is the sum of $7,580,099.59, which is the calculation provided in ¶6 of the Affidavit of Walter M. Singer and attached thereto as Exhibit "B". This is the interest calculation using the three-month Certificates of Deposit interest rates from September 8, 1969 through January 30, 1985, on a compounded basis. The equivalent compounded annual interest rate over this period of time using this approach equals 8.9035%.

We have provided the Court for its convenience interest calculations using other approaches as shown in ¶¶8 through 16 of the Affidavit of Walter Singer and Exhibit "C" through "L" attached thereto. Plaintiffs strongly urge the Court to apply the interest calculation using the three-month Certificate of Deposit interest rates since that approach is the most appropriate and closely analogous approach to a similar type of investment as the Plaintiffs in this case. This approach would compensate the Plaintiffs for the loss of the use of their money and make whole the Plaintiffs for their loss. This approach based upon a review and analysis of the commercial money and capital market rates and the prime rate during the appropriate period of time is the rate of interest the Plaintiffs could reasonably have expected to earn by a similar type of investment during this period of time. This is the most appropriate

approach upon a consideration of fairness and all the other factors which have been discussed above and applied by the courts in determining the award of prejudgment interest to Plaintiffs in Federal Securities claim cases.

The average prime rate charged by banks over the period of time from September 1969 to January 30, 1985 is 10.15%. [*See* Affidavit of Walter M. Singer at ¶15 and Exhibits "J" and "K" attached thereto].

For the convenience of the Court Plaintiffs have provided the following chart of other interest calculations:

	Total Interest	Equivalent Annual Interest Rate
Three Month Certificates of Deposit (compounded) [Aff. of Singer at ¶7 and Exhibit "B" attached thereto]	$7,580,099.59	8.9035%
Annual Average of Three Month Certificates of Deposit (compounded) [Aff. of Singer at ¶8 and Exhibit "C" attached thereto].	$7,063,196.91	8.5589%
Three Month Cerificates of Deposit (simple interest) [Aff. of Singer at ¶9 and Exhibit "D" attached thereto]	$3,614,171.77	8.919%
Annual Average Interest Rate—Three Month Certificates of Deposit (simple interest) [Aff. of Singer at ¶10 and	$3,597,382.62	8.8776%

Exhibit "E" attached thereto].		
Six Month Prime Commercial Paper (compounded) [Aff. of Singer at ¶ 11 and Exhibit "F" attached thereto].	$7,169,596 .11	8.7242%
Annual Average Six Month Prime Commercial Paper (compounded) [Aff. of Singer at ¶ 12 and Exhibit "G" attached thereto].	$6,746,720 .34	8.4255%
Six Month Prime Commercial Paper (simple interest) [Aff. of Singer at ¶ 13 and Exhibit "H" attached thereto].	$3,544,988 .90	8.7483%
Annual Average of Six Month Prime Commercial Paper (simple interest) [Aff. of Singer at ¶ 14 and Exhibit "I" attached thereto].	$3,498,903 .90	8.6346%
Constant 7% (compounded annually) [Aff. of Singer at ¶ 16 and Exhibit "L" attached thereto].	$4,830,744 .71	7.00%
Constant 7% (simple interest) [Aff. of Singer at ¶ 17 and Exhibit "M" attached thereto].	$2,836,538 .63	7.00%

The interest calculations applying a 7% interest rate

per annum from September 8, 1969 to January 30, 1985 compounded annually and utilizing a simple interest approach not compounded annually, are based on an application of O.C.G.A. §7-4-2. The constant 7% interest rate clearly is not appropriate in this case based on the circumstances and facts in evidence, based on all the facts the Court must consider in determining an award of prejudgment interest, and based on a review and analysis of the cases recognizing the intent of an award of prejudgment interest to make the Plaintiffs whole and to provide them for the lost use of their money from the date of the acts complained of. A review and analysis of the prime rate (10.15%) and the commercial market interest rates during the appropriate period of time, and consideration of what Plaintiffs could reasonably have expected to earn by a similar type of investment during this peirod of time, mandate that the interest calculation applying a constant 7% rate is far too small and would not compensate the Plaintiffs for the loss of the use of their money. This case is in a unique situation due to the comparative states of the commercial market rates from the time of the acts complained to the date of judgment.

CONCLUSION

For all the above reasons and based on the record in this case, Plaintiffs respectfully request the Court to award them prejudgment interest from September 8, 1969 to the date of Judgment, January 30, 1985.

Respectfully submitted,

/s/
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/s/
HAROLD T. DANIEL, JR.
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/s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a true and correct copy of the foregoing Brief In Support of Plaintiffs' Motion for Award of Pre-Judgment Interest to all counsel of record by depositing a copy of same in the United States mail, with adequate postage affixed thereto, addressed as follows:

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This 11 day of February, 1985.

/s/
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Attorney for Plaintiffs

No. 87-1201

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1987

MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,

Plaintiffs-Petitioners,

v.

ERNST & WHINNEY,

Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS MYLES OSTERNECK, ET AL.

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SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1987

MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,

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ARGUMENT AND CITATION OF AUTHORITIES

Petitioners Myles Osterneck et al. ("the Osternecks") respectfully submit this supplemental brief in light of this Court's recent decision in Buckanan v. Stanships, Inc., No. 87-133 (U.S. March 21, 1988) (per curiam) (56 U.S.L.W. 3645). Buckanan reversed the Fifth Circuit's decision that a motion for costs can be a Rule 59(e) motion under the analysis in Harcon Barge Co. v. D & G Boat Rentals, Inc., 784 F.2d 665 (5th Cir. 1986) (en banc), cert. denied, 479 U.S. ____ (1986).

Buckanan supports the Osternecks' petition in several respects. First, Buckanan reaffirms the analysis of the scope of Rule 59(e) set out in White v. New Hampshire Dept. of Employment

Security, 455 U.S. 445 (1982):

> "'[T]he federal courts generally invoke Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits.' White, supra, at 457. In White, we held that a motion for attorney's fees under 42 U.S.C. §1988 was not a Rule 59(e) motion. We reasoned that because §1988 provides for fees independently of the underlying cause of action and only for 'a prevailing party,' a motion for fees required an inquiry 'separate from the decision on the merits - an inquiry that cannot even commence until one party has prevailed.' 455 U.S. at 451-452. [cit.] Such a motion therefore 'does not imply a change in the judgment, but merely seeks what is due because of of the judgment.'"

Buckanan, 56 U.S.L.W. at 364 (emphasis original).

Second, Buckanan shows that the White analysis is not limited to attorney's fees under 42 U.S.C. §1988.

Rather, Buckanan makes it clear that the White analysis extends to other cases,such as the present case, where the party is entitled to further relief because of the decision on the merits.

Third, Buckanan clarifies the use of the term "collateral" in the White analysis. In determining that the costs issue was collateral to the decision on the merits, Buckanan focused on the fact that the relief sought in the post-judgment motion was not provided in the statute upon which the underlying cause of action was based.

> "Because the Death on the High Seas Act contains no provision regarding costs, respondents' motion for costs necessarily was predicated on Federal Rule of Civil Procedure 54(d)....
> While a different issue may be presented if expenses of this sort were provided as an aspect of the underlying action, we are

> satisfied that a motion for costs filed pursuant to Rule 54(d) does not seek 'to alter or amend the judgment' within the meaning of Rule 59(e). Instead, such a request for costs raises issues wholly collateral to the judgment in the main cause of action, issues to which Rule 59(e) was not intended to apply."

Id. Thus, because the relief sought by the post-judgment motion was not provided in the statute upon which the cause of action was based, it necessarily involved an independent and separate inquiry from the decision on the merits.

Similar to the relief sought in Buckanan, the relief sought by the Osternecks' motion was not provided for by the statute upon which the underlying cause of action was based. The underlying cause of action in the present case was based on §10(b) of the Securities Act of 1934 and Rule 10b-5.

Neither §10(b) nor Rule 10b-5, however, provides for prejudgment interest. See Blau v. Lehman, 368 U.S. 403 (1962); Wolf v. Frank, 477 F.2d 467 (5th Cir. 1973). Instead, like 42 U.S.C. §1988 attorney's fees and the costs in Buckanan, the prejudgment interest was based on independent grounds, in this case of the equitable powers of the federal courts. Id. Indeed, the decision to award prejudgment interest on a federal securities claim involves many of the same considerations as are involved in a decision to award attorneys fees under §1988, such as, the delay in obtaining the judgment, the nature of the claim and the relief obtained. Id.; Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974). Moreover, the federal judge has the discretion to entirely deny

both §1988 attorney's fees and prejudgment interest on a securities claim if the equities demand. Blau, supra; White, supra; Johnson, supra; Wolf, supra.

Accordingly, the Osternecks' motion for prejudgment interest necessarily involved an independent and separate inquiry from the decision on the merits of their claim, an inquiry which could not even commence until after the Osternecks had prevailed on the merits of their securities claim. In fact, the decision to award prejudgment interest was not even made until six months after entry of the verdict and judgment which held certain defendants liable under §10(b) and Rule 10b-5.

Buckanan also focused on the fact that a motion for costs need not delay

entry of judgment as a further indication that the relief sought by the post judgment motion was collateral to the underlying cause of action. In the present case the District Court found that the motion for prejudgment interest need not delay the entry of judgment. Indeed, in the present case the District Court expressly deferred consideration of prejudgment interest so that judgment on the merits could be promptly entered. See Petition at App. 3. Because the Osternecks' motion did not need to delay entry of judgment on the merits of their claim, it necessarily involved issues wholly collateral to the underlying cause of action, issues to which Rule 59(e) was not intended to apply. Like the motion for attorney's fees under §1988 and a motion for costs, the Osternecks' motion

"sought only what was due because of the judgment." See Buckanan, supra, 56 U.S.L.W. at 3646.

That the Osternecks' motion raised issues collateral to the merits of the main cause of action is also demonstrated by the District Court's order granting the motion. In the order, the District Court considered only facts and circumstances concerning the litigation itself which occurred after the cause of action arose and which resulted in the delay in bringing the case to trial. For example, the District Court stated that "[a]nother matter which contributed to some delay is the fact, that due to changes in judicial personnel in this district, this case has been assigned to five different district judges at various times." Petition at App. 11-12. Such

considerations clearly are collateral to the decision on the merits of the underlying cause of action.

Moreover, citing Norte & Co. v. Huffines, 416 F.2d 1189, 1191 (2d Cir. 1969), the order shows that while prejudgment interest is compensatory, it only compensates the plaintiff for the delay between recovery and the wrongdoing and is not meant to punish the defendant based on the merits of the plaintiff's claims. Petition at App. 10-11. The order, therefore, is consistent with the principle long established by this Court that, while prejudgment interest is compensatory, it "does not form the basis of the action, but is an incident to the recovery of the principal ...," and is only demanded "in respect of the detention" of the principal claim.

Stewart v. Barnes, 153 U.S. 456, 462-63 (1984) (emphasis added). Thus, although both prejudgment interest and attorney's fees under §1988 are compensatory damages which may be necessary to make the plaintiff fully "whole," see Johnson, supra; Wolf, supra; neither is an aspect of the merits of the underlying action. Buckanan, supra; Jenkins v. Whittaker Corp., 785 F.2d 720 (9th Cir. 1986).

Fourth, Buckanan concludes that an inaccurate designation of a motion to amend cannot deprive a party of the benefit of his timely notice of appeal. In the present case, however, the Eleventh Circuit placed great emphasis on the fact that the judgment granting the prejudgment interest was labeled "Amended Judgment." Osterneck v. E.T. Barwick Industries, 825 F.2d 1521, 1528 n. 11

(11th Cir. 1987).

All the above points show that the Eleventh Circuit's opinion that the Osternecks' motion for prejudgment interest was a Rule 59(e) motion conflicts with this Court's rulings in Buckanan and White, and that certiorari should be granted to address this conflict.

In addition to the above points, Buckanan supports the Osternecks' petition because it acknowledges the tension and conflict among the circuits resulting from the different approaches to Rule 59(e). While the Buckanan decision did resolve such tension and conflict as far as motions for costs are concerned, it did not resolve the conflict with regard to motions for prejudgment interest. Accordingly, the

Osternecks respectfully request this Court to grant their petition so that the tension and conflict among the circuits and the decisions of this Court with regard to motions for prejudgment interest can be resolved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served three copies of the within and foregoing **Supplemental Brief of Petitioners Myles Osterneck, Et Al.** on all parties required to be served by depositing the same in the United States mail, postage prepaid, to the following:

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This 11th day of April, 1988.

Paul Webb

PAUL WEBB, JR.

No. 87-1201

IN THE

Supreme Court of the United States

October Term, 1987

MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,
Plaintiffs-Petitioners,

v.

ERNST & WHINNEY,
Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

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LIST OF PARTIES

The parties to the proceedings below were the Petitioners Myles Osterneck, Guy-Kenneth Osterneck, and Myles Osterneck and Guy-Kenneth Osterneck as Trustees for the Benefit of Robert Osterneck (Plaintiffs-Appellants); E. T. Barwick Industries, Inc., M. E. Kellar, and B. A. Talley (Defendants-Cross Appellants); Eugene Barwick (Defendant-Appellee); and Respondent Ernst & Whinney (Defendant-Appellee).

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No. 87-1201

IN THE

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MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,
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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT ERNST & WHINNEY

ARGUMENT AND CITATION OF AUTHORITIES

Petitioners have submitted a supplemental brief suggesting that the decision in *Buckanan v. Stanships, Inc.*, 56 U.S.L.W. 3645 (U.S. March 21, 1988) (No. 87-133) (per curiam) supports the grant of their petition for certiorari. Contrary to Petitioners' contention, *Buckanan* poses no conflict with the Eleventh Circuit's decision that Petitioners' motion for prejudgment interest is subject to Federal Rule of Civil Procedure 59(e). As

was true of the petition, the supplemental brief posits only false conflicts unworthy of this Court's attention. Accordingly, the petition should be denied

The *Buckanan* case did not involve a motion for prejudgment interest. It held only that Rule 59(e) was inapplicable to a motion for costs filed pursuant to Rule 54. Because Rule 54 independently authorizes assessment of costs, and Rule 58 expressly divorces that assessment from the entry of judgment, this Court found that a costs award does not alter or amend the judgment. 56 U.S.L.W. at 3646.

Neither the rule nor the rationale of *Buckanan* reaches Petitioners' Rule 59(e) motion for prejudgment interest. No separate rule of civil procedure specifically contemplates motions for prejudgment interest or divorces interest awards from the entry of judgment. Unlike the award of costs in *Buckanan,* the award of prejudgment interest on Petitioners' securities claims was, in form and in substance, an integral part of the judgment on the merits and squarely within Rule 59(e). *See* Respondent's Brief in Opposition at 8-9.

Petitioners argue that any "relief" not specified by a statute creating a cause of action ought to be considered "collateral" to the merits, and hence outside Rule 59(e) and independently appealable. Supplemental Brief at 7-8. Petitioners' argument is particularly inappropriate where, as here, the right of action is judicially implied. Rule 59(e) is not meant to create separate appeals whenever a statute does not specify every element of available relief for a particular claim.

Were the Court to endorse Petitioners' "analysis" of "collateral matters," it would effectively repeal Rule 59(e) and Rule 4(a)(4) of the Federal Rules of Appellate

Procedure. A holding that an amended judgment awarding prejudgment interest is "collateral to" the initial judgment, and thus outside Rule 59(e), would render the initial judgment and amended judgment separately appealable. The consequences of such a ruling would be unacceptably duplicative and unworkable for the courts of appeals. That is especially true in securities cases such as this one in which the propriety of a prejudgment interest award cannot be evaluated without considering the same merits-based factors supporting the initial judgment on the merits. *See* Respondent's Brief in Opposition at 9; *Osterneck v. E.T. Barwick Indus., Inc.*, 825 F.2d 1521, 1526 (11th Cir. 1987).

Existing decisions of this Court already provide a suitable framework for deciding issues arising under Rule 59(e). The Eleventh Circuit's application of Rule 59(e) to Petitioners' motion for prejudgment interest on federal securities claims is fully compatible with the decisions of this Court and those of other circuits. The petition should be denied.

CONCLUSION

For the foregoing reasons as well as those contained in Respondent's Brief in Opposition, the petition for a writ of certiorari should be denied.

Dated: Atlanta, Georgia
May 11, 1988

Respectfully submitted,

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I HEREBY CERTIFY that I have this day served three copies of the within and foregoing Supplemental Brief of Respondent Ernst & Whinney upon all parties required to be served by depositing same in the United States Mail, postage prepaid, addressed to the following:

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No. 87-1201

In The
Supreme Court of the United States
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MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,

Petitioners,

v.

ERNST & WHINNEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED JUNE 6, 1988

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Myles Osterneck, et al. v. E.T. Barwick Industries, Inc. et al.
Docket No. C75-1728A
Northern District of Georgia
Atlanta Division

Date	Proceedings
Sept. 10, 1975	Complaint filed.
Jan. 30, 1985	JURY TRIAL: VERDICT reached in favor of pla in amt of $2,632,234.00 as compensatory damages against dft E.T. Barwick Ind., M.E. Keller & B.A. Talley; Pla's moved for pre-judgment int; ct directed plas to submit brief w/in 10 days thereafter; Ct will not submit issue of 2 yr. statute of limitations to jury & directed clerk to enter judgment. EXHIBITS returned to pla & dft's counsel. VERDICT for pla. JUDGMENT ENTERED in favor of plas. & against dfts. E.T. Barwick Industries, Inc., M.E. Kellar & B.A. Talley on the Federal Securities Claim & State Common Law Claim in the amount of $2,632,234.00 as compensatory damages w/int. at rate of 9.09% & costs; further that dft E.T. Barwick recover of plas his costs of action; & in favor of dft, Ernst & Whinney & against plas on FSC & that dft E&W recover of plas costs of action, cc & eod 1/31/85.
Feb. 11, 1985	MOTION for award of prejudgment interest w/brief, aff of Walter Singer by plas.
Feb. 20, 1985	(File closed statistically).
Feb. 26, 1985	SUBMITTED ON MOTION FOR AWARD OF PREJUDGMENT INTEREST BY PLAS.

Date	Proceedings
Mar. 1, 1985	NOTICE OF APPEAL by plas, from the verdict/judgment dated January 30, 1985, fees paid cc & cert c/dkt., NOA, verdict/judgment to USCA ACK.
	NOTICE OF APPEAL by Buford Talley, dft, from verdict/judgment dated January 31, 1985, fees paid, cc & cert c/dkt, NOA, verdict/judgment to USCA. ACK
Mar. 14, 1985	NOTICE OF APPEAL by E.T. Barwick, Inc. dft, from the judgment & jury verdict, PD dated 1/30/85, *no fees paid*, cc & cert c/dkt, NOA, judgment to USCA. ACK-85-8165
Mar. 15, 1985	NOTICE OF CROSS-APPEAL by dft, Ernst & Whinney from ct's order & rulings which held that a four-year limitations period was applicable to plas' claims under § 10(b) of Securities Exchange Act of 1934 & Rule 10b-5 promulgated thereunder, *no fees paid*, cc & cert c/dkt, NOA, judgment to USCA (paid 3/25/85) ask-85-8165
Mar. 22, 1985	RESUBMITTED ON MOTION FOR AWARD OF PREJUDGMENT INTEREST BY PLAS.
Mar. 28, 1985	ORDER DENYING dft's motion to stay execution of judgment w/out giving bond, cc & eod 3/29/85.
June 21, 1985	NOTICE OF APPEAL by Ernst & Whinney, from the order dated 5/22/85, regarding E & W's bill of costs, cc & cert c/dkt, order & NOA to USCA, no fees paid, ltr to E & W's atty on 7/2/85. ACK-85-8523 (PAID 7/5/85)

Date	Proceedings
July 1, 1985	ORDER GRANTING plas' motion for award of prejudgment interest; plas shall recover of dfts E.T. Barwick Industries, Inc., M.E. Kellar, and B.A. Talley an award of prejudgment interest in the amt of $945,512.85 on the federal securities claim, cc & eod 7/9/85.
July 9, 1985	AMENDED JUDGMENT ENTERED by adding "plaintiff shall recover of dfts, E.T. Barwick Ind., Inc., M.E. Kellar, & B.A. Talley an award of prejudgment interest in the amount of $945,512.85 on the federal securities claim," cc & eod 7/9/85.
July 31, 1985	NOTICE OF CROSS APPEAL by plas against M.E. Kellar, Buford A. Talley, E.T. Barwick Industries, Inc., and E.T. Barwick from that portion of the ct's orders & amended judgment which provide the prejudgment interests & costs awarded to pltfs (fee paid) cert. copy of dkt., NO Cross-APPEAL, Order & amended judgment to USCA, cc & eod 8/2/85 ACK 85-8593.

[R82-8496]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, ET AL, Plaintiffs,	)	
vs.	)	CIVIL ACTION
E. T. BARWICK INDUSTRIES, ET AL, Defendants.	)	NO. C75-1728A

- VOLUME 54 -

Transcript of proceedings before The Honorable Horace T. Ward, United States District Judge, and a jury, at Atlanta, Fulton County, Georgia, commencing on October 16, 1984.

• • •

(Discussion in Open Court on January 30, 1985)

The Court: There's another matter that has to be brought to the court on this issue, that is, prejudgment interest on this particular verdict, but I am going to have to handle that separately and have it argued to me.

All right, we'll stand in recess, and just on that one point as to whether a mini-trial or resubmission of the matter to the jury on whether they would find that the issue was barred by a two-year statute of limitations. It will be one question if it's submitted.

You discuss it among yourselves and come back to my office and I will decide when I'm going to hear the prejudgment interest arguments.

We'll stand in recess for ten minutes.

[A short recess was had.]

The Court: All right. I will hear the motion concerning prejudgment interest. I know it's going to be offered from the plaintiffs. Just state on the record that you are going to move for prejudgment interest.

Mr. Webb: Yes, Your Honor, we are. We do move for prejudgment interest in favor of the plaintiffs against the defendants against whom the verdicts were returned.

The Court: In view of the fact that I do not wish to have it argued right now and based on the request of the lawyers, I will allow it to be submitted in writing.

The plaintiffs will have ten days to present to the judge the plaintiffs' position on prejudgment interest and the affected defendants will have ten days thereafter, after they receive a copy of the brief and submission of the plaintiffs, to respond and then the judge will rule on it.

The judge will direct the clerk to issue a judgment on the verdict and I don't think—I think it can be done without having to have the lawyers submit proposed judgments. Sometimes you have to do that, but I think it can be figured out, Ms. Daniels. If you need any assistance you can talk to the judge.

The judgment will be entered on this particular verdict as soon as possible, then if prejudgment interest is granted it will be—the judgment can be amended.

• • •

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, GUY-KENNETH OSTERNECK, ROBERT OSTERNECK, MYLES OSTERNECK and GUY-KENNETH OSTERNECK AS TRUSTEES FOR THE BENEFIT OF ROBERT OSTERNECK,

Plaintiffs

CIVIL ACTION

VS

NO. C75-1728A

E. T. BARWICK INDUSTRIES, INC., E. T. BARWICK, M. E. KELLAR, B. A. TALLEY AND ERNST & WHINNEY

Defendants

JUDGMENT

This action came before the Court and a jury, Honorable Horace T. Ward, U. S. District Judge, presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the plaintiffs and against the defendants E. T. BARWICK INDUSTRIES, INC., M. E. KELLAR and B. A. TALLEY on the Federal Securities Claim and the State Common Law Claim in the amount of TWO MILLION, SIX HUNDRED THIRTY-TWO THOUSAND, TWO HUNDRED THIRTY-FOUR & 00/100 dollars. ($2,632,234.00) as compensatory damages, with in-

terest thereon at the rate of 9.09% as provided by law, and their costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered in favor of defendant E. T. BARWICK and against the plaintiffs on the Federal Securities Claim and the State Common Law Claim and that the defendant E. T. BARWICK recover of the plaintiffs his costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered in favor of the defendant ERNST & WHINNEY and against the plaintiffs on the Federal Securities Claim and that defendant ERNST & WHINNEY recover of the plaintiffs its costs of action.

Dated at Atlanta, Georgia, this 30th day of January, 1985.

FILED & ENTERED IN CLERK'S OFFICE
THIS 30TH DAY OF JANUARY, 1985
BEN H. CARTER, CLERK

By: Patsy L. Daniels
Deputy Clerk

BEN H. CARTER, CLERK
/s/ Patsy L. Daniels
Patsy L. Daniels
Deputy Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	FILE NO.
E. T. BARWICK	)	C75-1728A
INDUSTRIES, INC., et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR AWARD
OF PREJUDGMENT INTEREST

COME NOW Plaintiffs, Myles Osterneck, Guy-Kenneth Osterneck and Robert Osterneck and Myles Osterneck and Guy-Kenneth Osterneck as Trustees for the Benefit of Robert Osterneck (hereinafter "Plaintiffs") and move the Court for an award of prejudgment interest from September 8, 1969 to the date of Judgment, January 30, 1985, against Defendants E. T. Barwick Industries, Inc., Melvin E. Kellar and Buford A. Talley, and respectfully show the Court the following:

1.

On January 30, 1985, a Verdict and Judgment in favor of Plaintiffs was filed and entered in the above-styled action and against Defendants E. T. Barwick Industries, Inc., M. E. Kellar and B. A. Talley on their Federal Securities Claims and State of Georgia common law and statutory fraud claims in the amount of Two Million, Six Hun-

dred Thirty-Two Thousand, Two Hundred Thirty-Four Dollars ($2,632,234.00) as compensatory damages.

2.

Pursuant to the instructions of the Court given to the jury, the amount of the compensatory damages awarded to Plaintiffs was based on their damages as of the date of the Merger Agreement which is September 8, 1969.

3.

The grounds and authority for the award of prejudgment interest to Plaintiffs and the appropriate amount of interest are provided in Plaintiffs' accompanying Brief in support of its Motion for an award of prejudgment interest concurrently filed herewith.

4.

Plaintiffs also submit in support of their Motion for an award of prejudgment interest an Affidavit of Walter M. Singer with exhibits which is currently filed herewith.

WHEREFORE, for the reasons contained in Plaintiffs' Brief and the Affidavit of Walter M. Singer, Plaintiffs respectfully request that this Court award it prejudgment interest from September 8, 1969 to the date of the Judgment.

Respectfully submitted,

/s/

PAUL WEBB, JR.
Georgia State Bar No. 744650

/s/

HAROLD T. DANIEL, JR.
Georgia State Bar No. 204000

/s/

KEITH M. WIENER
Georgia State Bar No. 757475
Attorneys for Plaintiffs

Of Counsel:

WEBB & DANIEL
1901 Peachtree Center Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 522-8841

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a true and correct copy of the foregoing Plaintiffs' Motion for Award of Pre-Judgment Interest to all counsel of record by depositing a copy of same in the United States mail, with adequate postage affixed thereto, addressed as follows:

Philip R. Russ, Esq.
1005 Texas American Bank Building
P. O. Box 12073
Amarillo, Texas 79101

Foy R. Devine, Esq.
Devine & Morris
Four Piedmont Center, Suite 111
3565 Piedmont Road, N.E.
Atlanta, Georgia 30305

Susan Hoy, Esq.
High House
309 Sycamore Street
Decatur, Georgia 30030

Richard M. Kirby, Esq.
Hansell & Post
3300 First Atlanta Tower
Atlanta, Georgia 30383

Earle B. May, Jr., Esq.
Alston & Bird
1200 C&S National Bank Building
35 Broad Street
Atlanta, Georgia 30335

This 11 day of February, 1985.

/s/.....
KEITH M. WIENER
Georgia State Bar No. 757475
Attorney for Plaintiffs

IN THE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	FILE NO.
E. T. BARWICK	)	C75-1728A
INDUSTRIES, INC., et al.,	)	
	)	
Defendants.	)	

BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR AWARD
OF PREJUDGMENT INTEREST

INTRODUCTION

Plaintiffs filed their Complaint in the above-referenced action on September 4, 1975. The trial of this case began on October 15, 1984 and ended with a verdict and judgment on January 30, 1985.

The verdict and judgment rendered by the jury was in favor of the Plaintiffs and against Defendants E. T. Barwick Industries, Inc., M. E. Kellar and B. A. Talley (hereinafter "Defendants") on the Federal Securities claims and the Georgia common law and statutory fraud claims in the amount of Two Million, Six Hundred Thirty-Two Thousand, Two Hundred Thirty-Four Dollars ($2,632,234.00) as compensatory damages. This verdict and judgment was filed and entered in the Clerk's office on January 30, 1985.

Pursuant to the Court's instructions given to the jury, the amount of compensatory damages was determined as of the date of the Merger Agreement entered into between Plaintiffs and Defendant E. T. Barwick Industries, Inc. That date is September 8, 1969. Thus, pursuant to the Court's instructions, the amount of $2,632,234 as compensatory damages is the amount of damages the Plaintiffs suffered on September 8, 1969.

Plaintiffs have filed concurrently herewith their Motion for an award of prejudgment interest at the request of the Court. Plaintiffs submit this Brief in support of their Motion. Plaintiffs also submit in support of their Motion an Affidavit of Walter M. Singer concurrently filed herewith, containing the calculations of an appropriate award of prejudgment interest.

ARGUMENT AND CITATIONS OF AUTHORITIES

1. PLAINTIFFS ARE ENTITLED TO AN AWARD OF PREJUDGMENT INTEREST FROM SEPTEMBER 8, 1969 TO THE DATE OF JUDGMENT

It is well-established that in the absence of a statutory provision, the award of prejudgment interest lies within the discretion of the Court, including cases involving Federal Securities law and state common law fraud claims. *E.g. Blau v. Lehman,* 368 U.S. 403, 414, 82 S.Ct. 451, 457, 7 L.Ed.2d 403, 411 (1962); *Huddleston v. Herman & MacLean,* 640 F.2d 534, 560 (5th Cir. 1981), *aff'd in part & rev'd in part on other grounds,* — U.S. —, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983) (Federal Securities claim, § 10(b) and Rule 10b-5 case); *Hembree v. Georgia Power Company,* 637 F.2d 423, 430 (5th Cir. 1981); *Payne v. Panama Canal Company,* 607 F.2d 155, 166 (5th Cir. 1979);

West v. Harris, 573 F.2d 873, 883 (5th Cir. 1978); *cert. denied,* 440 U.S. 946, 99 S.Ct. 1424, 59 L.Ed.2d 635 (1979); *Wolf v. Frank,* 477 F.2d 467 (5th Cir.), *cert. denied,* 414 U.S. 975, 94 S.Ct. 287, 38 L.Ed.2d 218 (1973) (federal securities claim under Rule 10b-5); *George R. Hall, Inc. v. Superior Trucking Company, Inc.,* 532 F.Supp. 985, 997-998 (N.D. Ga. 1982).

This well-established rule is universally applied by other jurisdictions. *E.g., Sharp v. Coopers & Lybrand,* 649 F.2d 175, 192-193 (3d Cir. 1981) (appropriate to award prejudgment interest in § 10(b) and Rule 10b-5 case); *Rolf v. Blyth Eastman Dillon & Co., Inc.,* 570 F.2d 38, 50 (2d Cir. 1978) (appropriate to award prejudgment interest in § 10(b) and Rule 10b-5 case); *Holmes v. Bateson,* 583 F.2d 542, 564 (1st Cir. 1978) (appropriate to award prejudgment interest in § 10b and Rule 10b-5 case); *Sundstrand Corp. v. Sun Chemical Corp.,* 553 F.2d 1033, 1051 (7th Cir. 1977) (appropriate to award prejudgment interest in § 10(b) and Rule 10b-5 merger case from the date of merger agreement to the date of judgment); *Occidental Life Insurance Co. v. Pat Ryan & Associates, Inc.,* 496 F.2d 1255, 1268-1269 (4th Cir.), *cert. denied,* 419 U.S. 1023, 95 S.Ct. 499, 42 L.Ed.2d 297 (1974) (appropriate to award prejudgment interest especially in § 10(b) and Rule 10b-5 case); *Wessel v. Buhler,* 437 F.2d 279, 284 (9th Cir. 1971); *Norte & Company v. Huffines,* 416 F.2d 1189, 1191, 1192 (2d Cir. 1969), *cert. denied sub nom,* 397 U.S. 989, 90 S.Ct. 1121, 25 L.Ed.2d 396 (1970); *Freshi v. Grand Coal Venture,* 588 F.2d 1257, 1260 (S.D.N.Y. 1984) (appropriate to award prejudgment interest in a Federal Securities fraud case involving § 10(b) and Rule 10b-5); *Western Federal Corporation v. Davis,* 553 F.Supp. 818 (D. Ariz. 1982)

aff'd, 739 F.2d 1439 (9th Cir. 1984) (appropriate to award prejudgment interest at the on-going commercial money market rate in a Federal Securities fraud case involving § 10(b) and Rule 10b-5; *Spatz v. Borenstein,* 513 F.Supp. 571, 584 (N.D. Ill. 1981) (appropriate to award prejudgment interest in a Federal Securities fraud case involving § 10(b) and Rule 10b-5); *Blasdel v. Mullenix,* 356 F.Supp. 924, 928 (W.D. Okla. 1971) (appropriate to award prejudgment interest in a Federal Securities fraud case involving § 10(b) and Rule 10b-5); *Johns Hopkins University v. Hutton,* 297 F.Supp. 1165, 1227-1230, 1233 (D. Md. 1968), *aff'd in part & rev'd in part on other grounds,* 422 F.2d 1124 (4th Cir. 1970) (appropriate to award prejudgment interest in Federal Securities fraud case involving § 10(b) and Rule 10b-5).

II. THE FACTORS TO BE APPLIED IN DETERMINING AN APPROPRIATE AWARD OF PREJUDGMENT INTEREST

In determining whether to award prejudgment interest, the major factor permeating cases in which prejudgment interest has been allowed is the necessity to compensate an injured plaintiff, and the courts recognize that "the only way the wronged party can be made whole is to award him [prejudgment] interest from the time he should have received the money." *E.g., Hembree v. Georgia Power Company,* 637 F.2d 423, 430 (5th Cir. 1981), *quoting Louisiana & Arkansas Railway v. Export Drum Co.,* 359 F.2d 311, 317 (5th Cir. 1966); *Payne v. Panama Canal Company,* 607 F.2d 155, 166 (5th Cir. 1979); *West v. Harris,* 573 F.2d 873, 883 (5th Cir. 1978), *cert. denied,*

440 U.S. 946 (1979); *George R. Hall, Inc. v. Superior Trucking Co.*, 532 F.Supp. 985, 997-998 (N.D. Ga. 1982).

The general rule in this Circuit, that the only way the wronged party can be made whole is to award him prejudgment interest from the time he should have received the money on the date of the purchase or sale, is based on the principal that at the conclusion of the litigation the parties should be in the same position they occupied at the time of the transaction which lead to the litigation. *E.g., Hembree, supra,* 637 F.2d at 450; *Payne, supra,* 607 F.2d at 166; *West, supra,* 573 F.2d at 882-883; *Louisiana & Arkansas Railway Co., supra,* 359 F.2d at 317; *George R. Hall Company, Inc., supra,* 532 F.Supp. at 997-998.

The federal standard applied in determining an award of prejudgment interest in § 10(b) and Rule 10b-5 cases "is one of fairness" and a balancing of the equities. *Huddleston, supra,* 640 F.2d at 560 and cases cited in fn. 48 of the opinion; *Balan v. Lehman,* 368 U.S. 403, 82 S.Ct. 451, 457; *Sharp v. Coopers & Lybrand, supra,* 649 F.2d at 193; *West, supra,* 573 F.2d at 883; *Norte & Co.,* 416 F.2d at 1191; *Wessel, supra,* 437 F.2d at 284; *Wilsmann v. The Upjohn Co.,* 572 F.Supp. 242, 245 (W.D. Mich. 1983) (allowed an award of prejudgment interest in Federal Securities fraud case involving § 10(b) and Rule 10b-5 case).

In considering the fairness to the plaintiff for an award of prejudgment interest, the courts focus on awarding the plaintiff an amount to compensate him *for the value of the lost use of his money. E.g., see* cases previously cited for the proposition that the only way to make the plaintiff whole is to award him prejudgment interest from the time he should have received the

money cited above; *Kris-Kraft Industries, Inc. v. Piper Aircraft Corp.,* 516 F.2d 172, 191 (2d Cir. 1975), *rev'd on other grounds,* 430 U.S. 1, 97 S.Ct. 926 (1977) (an award of prejudgment interest should compensate the plaintiff for the lost use of his money); *Freschi v. Grand Coal Venture, supra,* 588 F.Supp. at 1261 (award of prejudgment interest should compensate a plaintiff for the lost use of his money); *Western Federal Corp. v. Davis, supra,* 553 F.Supp. at 821 *aff'd* (award of prejudgment interest at the commercial money market rate in an effort to compensate the plaintiffs for the loss of the use of their money); *George R. Hall, Inc., supra,* 532 F.Supp. at 997 (the court held it was impossible to say that a plaintiff had been made whole if it was merely paid back the costs of its 1979 repairs in inflated 1982 dollars without any prejudgment interest); *Johns Hopkins University v. Hutton,* 297 F.Supp. 1165, 1228 (D.C. Md. 1968), *aff'd in part & rev'd in part on other grounds,* 422 F.2d 1124 (4th Cir. 1970), *cert. denied,* 416 U.S. 916 (1974) (rate of prejudgment interest awarded should "compensate fairly the defrauded purchaser for the loss of the use of his money", 297 F.Supp. at 1229); *see Collier v. Granger,* 258 F.Supp. 717 (S.D.N.Y. 1966).

Other factors and standards which federal courts use in determining whether or not to grant prejudgment interest in a § 10(b) and Rule 10b-5 case include the degree of personal wrongdoing on the part of the Defendants, whether the prejudgment interest would be compensatory in nature, whether Plaintiffs passed up other, reasonably available and attractive opportunities, whether the Plaintiffs intentionally prolonged

the time between the occurrence of the violation and the award of the Judgment or whether the Defendants were at least equally if not more responsible for the delay. *E.g., Norte & Co. v. Huffines*, 416 F.2d 1189, 1191-1192 (2d Cir. 1969); *Wilsmann v. The Upjohn Company*, 572 F.Supp. 242, 245 (W.D.Mich. 1983); *Western Federal Corporation v. Davis*, 553 F.Supp. 818, 821 (D.Ariz. 1982), *aff'd*, 739 F.2d 1439 (9th Cir. 1984); *Johns Hopkins University v. Hutton*, 297 F.Supp. 1165, 1227-1230, 1233 (D. Md. 1968), *aff'd & rev'd in part on other grounds*, 422 F.2d 1124 (4th Cir. 1970); *see* cases cited *supra* holding that considerations of fairness must be reviewed and that the only way to make a plaintiff whole is to award him prejudgment interest for the lost use of his money; *see Huddleston v. Hermon & MacLean*, 640 F.2d 534, 560 and cases cited in fn. 48 (5th Cir. 1981), *aff'd in part & rev'd in part on other grounds*, — U.S. —, 103 S.Ct. 683, 74 L. Ed.2d 548 (1983).

Turning to the facts in this case, an award of prejudgment interest clearly is fair under any analysis or considerations of fairness. The jury has found that the Defendants E. T. Barwick Industries, Inc., M. E. Kellar and B. A. Talley violated Federal Securities laws and statutory and common law fraud against the Plaintiffs and, as a result of their actions and conduct, Plaintiffs sold their family business which was their primary if not their sole asset, on terms which they would not have accepted but for such conduct and actions on the part of these Defendants.

It is clear that if the Plaintiffs had been informed of what the jury has found to be the truth concerning the

inaccuracy of the financial statements and financial condition of E. T. Barwick Industries, Inc., they would not have entered into the Merger Agreement. The jury awarded damages pursuant to the Court's instructions as of the date of the merger, September 8, 1969. The Plaintiffs have lost the use of that money since September 1969. Thus, the degree of personal wrongdoing on the part of these Defendants has been established, and fundamental considerations of fairness dictate an award of prejudgment interest be provided to the Plaintiffs.

The uncontradicted testimony at trial established that there was available substantial and reasonable alternative investment opportunities to the Plaintiffs prior to their entering the merger with E. T. Barwick Industries, Inc. [Trial Testimony of: Eric Blum, Kenneth Chasser, Myles Osterneck, and Guy Osterneck]. Therefore, there can be no doubt that the Plaintiffs passed up other, reasonably available and attractive opportunities to enter into this Merger Agreement and purchase stock of E. T. Barwick Industries, Inc. in exchange for the stock and assets of their family business, Cavalier Bag Company.

The Merger Agreement occurred on September 8, 1969. This case, instituted on September 4, 1975, did not come to trial for over nine (9) years. The trial in this case began on October 15, 1984. The delays involved in this complicated case, complicated both in terms of fact and law, cannot be laid on the doorstep of the Plaintiffs. In fact, the record in this case clearly demonstrates that the fault for the delay in bringing this case to trial lies squarely on the Defendants. Even a cursory review of the voluminous docket sheet filed in this case demon-

strates this fact. The Defendants filed numerous motions including several motions for reconsideration attempting to end this case before going to trial.

For example, the Defendants filed motions to dismiss or for judgment on the pleadings. After the Court in May 1978 denied the motions of the Defendants for judgment on the pleadings or to dismiss, the Defendants filed in June of 1978 a Motion for Reconsideration of the Judge's May, 1978 Order and again sought dismissal or judgment on the pleadings. Subsequent to the Court's Order in September 1978 denying Defandants' Motion for Reconsideration, the Defendants filed a motion for a separate trial on the statute of limitations issue in October, 1978. After the Court entered its Order denying the request for a separate trial, the Defendants filed in 1980 motions to dismiss or in the alternative for summary judgment.

Subsequent to the Court's Order in December 1981 denying the Defendants' motions for summary judgment, the Defendants filed in August of 1982 another Motion to Dismiss or in the Alternative for a Stay of the Proceedings. The Court in April of 1983 entered an Order denying Defendants' Motion to Dismiss or in the Alternative for An Order to Stay of the Proceedings. After this Order the Defendants in October of 1983 filed a Motion for Reconsideration of the Court's Order denying them a separate trial on the issue of the statute of limitations. Defendants also filed in October 1983 another Motion for Reconsideration (the second Motion for Reconsideration) to reconsider the Court's Order denying summary judgment on the statute of limitations issue. This Court in February of 1984 entered its Order denying the

Defendants' second Motion for Reconsideration of the statute of limitations issue and summary judgment, and entered its Order denying Defendant's Motion for Reconsideration of a separate trial on the statute of limitations issue.

Plaintiffs will not go through in detail the prior history of this case, which the Plaintiffs are confident the Court is well aware. There can be no doubt after reviewing the record of this case that the delay in bringing this case to trial is not the fault of the Plaintiffs, and clearly lies at the doorstep of the Defendants.

Another consideration which the courts apply in weighing the issue of prejudgment interest is to take judicial notice of the decline in the purchasing value of the dollar since the acts complained of occurred as a result of inflation. Federal Rule of Evidence 201. There, of course, can be no argument as to the decline of the purchasing value of the dollar since September of 1969 as the result of inflation, and this Court may and should take judicial notice of this fact when it determines the appropriateness of an award of prejudgment interest and the amount of prejudgment interest. It must be remembered that the $2.6 Million award to the Plaintiffs is for damages as of the date of the merger in September 1969.

It also is clear that the Plaintiffs were deprived of the principal sum they have been awarded as damages for fifteen (15) years, and thus prejudgment interest would in fact be compensatory.

In determining whether to award prejudgment interest to the Plaintiffs, the following fact should be considered:

> The jury's verdict necessarily included a finding that the defendants committed a fraud upon the plaintiff. As a result of this fraud, the plaintiff was deprived of the use of his money, and the defendants and the benefit of their fraud, for many years. *See, e.g., Holmes v. Bateson,* 583 F.2d 542, 564 (1st Cir. 1978). The plaintiff, therefore, *can only be made whole if prejudgment interest is awarded to him.*

Wilsmann v. Upjohn Company, supra, 572 F.Supp. at 245 (emphasis added and in original).

In *Norte & Company, supra,* 416 F.2d 1189, 1191 (2d Cir.) the court stated as follows:

> However, as the corporation had been derprived of almost $3,000,000, the difference between the fair value of the stock issued and what it actually received, through the calculated fraud of the defendants, there was good reason for the district court to award interest as compensatory damages.

Norte & Company v. Huffines, supra, 416 F.2d at 1191.

In *Cant v. A. G. Becker & Co., Inc.,* 384 F.Supp. 814 (N.D. Ill. 1974), the court in a Federal Securities fraud case stated it this way:

> "However, in light of a recent decision by the Court of Appeals of the Seventh Circuit and other decisions by federal courts in securities cases, *it is now clear that prejudgment interest may be awarded in situations wherein through the fault of another the plaintiff was deprived of beneficial use of its funds.*" (Citations omitted).
>
> As Judge Cummings stated in *Mattigan* (*Mattigan, Inc. v. Goodman,* 498 F.2d 233 (7th Cir. 1974):
>
> "Had plaintiffs not purchased the Fidelity stock, or purchased at a lower price, *they would have put the unused money somewhere, even if only in a savings account.* Unlike the non-existence profits and division as a result of defendants' misrepresentations, *the chance to use their money elsewhere was actually lost to plaintiffs....*"

Cant, supra, 384 F.Supp. at 815-816 (emphasis added) *quoting in part Mattigan, Inc., supra,* 498 F.2d at 240. The court in *Cant* like the other Federal Securities cases, awarded prejudgment interest to the plaintiffs assessed from the date of the purchase and thereafter on the aggregate loss incurred to the date of judgment. 384 F.Supp. at 816; *see* cases cited *supra.* The court pointed out:

> The defendant was found to be the "wrongdoer" in a series of stock transactions which were the subject of the litigation. A. G. Becker & Company, Inc. had the use of the plaintiff's funds for an extended period of time.

384 F.Supp at 816.

As well stated by the court in *Cant*:

> In lieu of rescission the Court still feels that plaintiff is entitled to an award of monetary damages sufficient to place him in the position he would have been had it not been for defendant's wrongful activity. Allowing damages, interest, and costs restores plaintiff to that position. *Plaintiff can only be made whole if placed in a posture which assumes that he had the opportunity to utilize his funds in a reasonable manner. The law does not permit defendants to obtain the beneficial use of plaintiff's funds at no cost to the wrongdoer.*

Cant, supra, 484 F.Supp. at 816 (emphasis added).

III. THE APPROPRIATE AWARD OF PREJUDGMENT INTEREST TO THE PLAINTIFFS

In determining the appropriate award of prejudgment interest to the Plaintiffs, the federal courts have recognized that they may award interest applying commercial market rates in order to compensate the Plaintiffs for the loss of the use of their money. In *Western Federal Corporation v. Davis, supra,* the court in a Federal Securities claim case stated the following:

> In light of the fact that the defendants violated the securities laws and that the plaintiffs have been deprived of the full use of the amounts paid, plaintiffs are entitled to recover prejudgment interest.

553 F.Supp. at 821. The court in *Western Federal* concluded that the appropriate rate of prejudgment interest to award the plaintiffs was based on the average rate that a consumer could have obtained in the money market during the two-year period in question. 553 F.Supp. at 821.

The court stated the following:

> *This Court recognizes that it may award interest at the money market rate in an effort to compensate the plaintiffs for the loss of the use of their money. See Johns Hopkins University v. Hutton,* 297 F.Supp. 1165, 1228 (citation omitted).

553 F.Supp. at 821 (emphasis added). The court pointed out that since the Federal Securities Act did not prescribe a legal rate of interest, "it has been ruled that the rate of interest imposed should '*compensate fairly the defrauded purchaser for the loss of the use of his money.*'" *Western Federal Corporation, supra,* 553 F.Supp. at 821 (emphasis

added), *quoting Johns Hopkins University v. Hutton,* 297 F.Supp. at 1229; *see Collier v. Granger,* 258 F.Supp. 717 (S.D.N.Y. 1966).

In *Johns Hopkins University v. Hutton,* 297 F.Supp. 1165 (D. Md. 1968), *aff'd in part & rev'd in part on other grounds,* 422 F.2d 1124 (4th Cir. 1970), *cert. denied,* 416 U.S. 916 (1974), the court approved an award of prejudgment interest in a Federal Securities claim case and recognized the commercial money market as appropriate to consider in determining the rate of prejudgment interest. In *Johns Hopkins* the Court rejected an automatic application of the legal rate of interest used by the state statute. After noting that prejudgment interest is used to compensate fairly the defrauded purchaser "for the loss of the use of his money", the court stated the following:

> *The comparative states of the money market at the times of purchase and of rescission are important factors in determining a compensatory rate of interest.* [Citations omitted].

The court in *Johns Hopkins* took judicial notice of the data submitted concerning the prime interest rates during the period from the time of the acts complained of until the date of judgment. 297 F.Supp. at 1230. *The court reviewed and analyzed the prime rate as demonstrating the reasonable level of return for a similar type of investment as made by the plaintiffs in that particular case.* In *Johns Hopkins,* the court stated that the plaintiff was "an investor anticipating a return on its investment." 297 F.Supp. at 1229. In order to place the plaintiff in a position it would have been in were it not for the violations of the Federal Securities law of defendants "*an examination is required to determine what Hopkins* [*plaintiff*]

could reasonably have expected to earn by a similar type of investment." 297 F.Supp. at 1229 (emphasis added).

This is an approach used by many cases as cited in the *Johns Hopkins* decision, the *Western Federal Corporation case* and other cases cited *supra*. The Court in *Johns Hopkins* concluded that the plaintiffs could have reasonably expected to earn a certain percentage per annum on its investment from the time of the acts complained of until the date of judgment. 297 F.Supp. at 1230. The Court determined that since the purpose of awarding interest to the defrauded purchaser "is to compensate him for the amount which he could have safely earned by the use of his money," the choice of any date other than the date of which the fraudulent sale was made, "would amount to a decree of less than full compensation." 297 F.Supp. at 1233 and cases cited.

The Court in *Johns Hopkins* determined the appropriate rate of interest per annum based on what it believed plaintiffs could reasonably have expected as a return on the type of investment involved during that period of time, reviewing and analyzing the prime rate during the period of time, considering what the plaintiff could reasonably have expected to earn by a similar type of investment during that period of time, considering the contractual language involved in that case, and determining an appropriate rate of interest as compensation for the loss of the use of the money the plaintiff should have received. 297 F.Supp. at 1227-1230, 1233, *aff'd*, 422 F.2d 1124 (9th Cir. 1970).

Thus, the federal courts clearly have recognized that the appropriate prejudgment interest imposed should

"compensate fairly the defrauded purchaser for the loss of the use of his money," and that a court may award interest based on the commercial market rates and the prime rate in an effort to compensate the plaintiffs for the loss of the use of their money from the date of the acts complained of to the date of judgment.

Turning to the facts applicable in this case, Plaintiffs have concurrently filed herewith an Affidavit of Walter M. Singer with exhibits to provide the Court with interest rate calculations during the appropriate period of time from September 8, 1969 to the date of Judgment, January 30, 1985.

In determining the interest rate calculation for the period beginning September 8, 1969 to January 30, 1985, the principal amount used was $2,632,234 which is the amount of the Judgment entered in favor of the Plaintiffs in the above-styled action. The date of the entry of the Judgment is January 30, 1985. The beginning date for determining the calculations, September 8, 1969 is the date of the merger agreement entered into between the Plaintiffs and Defendant E. T. Barwick Industries, Inc. and the date upon which the $2,632,234.00 in compensatory damages was determined pursuant to the instructions of the Court.

The generally accepted and most appropriate method in determining interest rate calculations concerning the value of the use of money over a period of time for a similar type of investment as made by the Plaintiffs in this case is to apply the three-month Certificates of Deposit interest rate calculations from September 8, 1969 to January 30, 1985 on a compounded interest basis. [Affi-

davit of Walter Singer at ¶¶ 6, 7 and 18]. This approach is the most appropriate in determining the proper rate of interest because the Plaintiffs, as testimony shows at the trial, intended as their goal a long-term growth investment and savings by their purchase of Barwick stock in exchange for the sale of Cavalier Bag Company. Based on this approach, the appropriate amount of interest from September 8, 1969 to January 30, 1985 is the sum of $7,580,099.59, which is the calculation provided in ¶ 6 of the Affidavit of Walter M. Singer and attached thereto as Exhibit "B". This is the interest calculation using the three-month Certificates of Deposit interest rates from September 8, 1969 through January 30, 1985, on a compounded basis. The equivalent compounded annual interest rate over this period of time using this approach equals 8.9035%.

We have provided the Court for its convenience interest calculations using other approaches as shown in ¶¶ 8 through 16 of the Affidavit of Walter Singer and Exhibit "C" through "L" attached thereto. Plaintiffs strongly urge the Court to apply the interest calculation using the three-month Certificate of Deposit interest rates since that approach is the most appropriate and closely analogous approach to a similar type of investment as the Plaintiffs in this case. This approach would compensate the Plaintiffs for the loss of the use of their money and make whole the Plaintiffs for their loss. This approach based upon a review and analysis of the commercial money and capital market rates and the prime rate during the appropriate period of time is the rate of interest the Plaintiffs could reasonably have expected to earn by a similar type of investment during this period of time.

This is the most appropriate approach upon a consideration of fairness and all the other factors which have been discussed above and applied by the courts in determining the award of prejudgment interest to Plaintiffs in Federal Securities claim cases.

The average prime rate charged by banks over the period of time from September 1969 to January 30, 1985 is 10.15%. [*See* Affidavit of Walter M. Singer at ¶ 15 and Exhibits "J" and "K" attached thereto].

For the convenience of the Court Plaintiffs have provided the following chart of other interest calculations:

	Equivalent Annual Interest Rate	Total Interest
Three Month Certificates of Deposit (compounded) [Aff. of Singer at ¶ 7 and Exhibit "B" attached thereto]	$7,580,099.59	8.9035%
Annual Average of Three Month Certificates of Deposit (compounded) [Aff. of Singer at ¶ 8 and Exhibit "C" attached thereto].	$7,063,196.91	8.5589%
Three Month Certificates of Deposit (simple interest) [Aff. of Singer at ¶ 9 and Exhibit "D" attached thereto]	$3,614,171.77	8.919%

Annual Average Interest Rate—Three Month Certificates of Deposit (simple interest) [Aff. of Singer at ¶ 10 and Exhibit "E" attached thereto].	$3,597,382.62	8.8776%
Six Month Prime Commercial Paper (compounded) [Aff. of Singer at ¶ 11 and Exhibit "F" attached thereto].	$7,169,596.11	8.7242%
Annual Average Six Month Prime Commercial Paper (compounded) [Aff. of Singer at ¶ 12 and Exhibit "G" attached thereto].	$6,746,720.34	8.4255%
Six Month Prime Commercial Paper (simple interest) [Aff. of Singer at ¶ 13 and Exhibit "H" attached thereto].	$3,544,988.90	8.7483%
Annual Average of Six Month Prime Commercial Paper (simple interest) [Aff. of Singer at ¶ 14 and Exhibit "I" attached thereto].	$3,498,903.90	8.6346%
Constant 7% (compounded annually) [Aff. of Singer at ¶ 16 and Exhibit "L" attached thereto].	$4,830,744.71	7.00%
Constant 7% (simple interest) [Aff. of Singer at ¶ 17 and Exhibit "M" attached thereto].	$2,836,538.63	7.00%

The interest calculations applying a 7% interest rate per annum from September 8, 1969 to January 30, 1985 compounded annually and utilizing a simple interest approach not compounded annually, are based on an application of O.C.G.A. § 7-4-2. The constant 7% interest rate clearly is not appropriate in this case based on the circumstances and facts in evidence, based on all the facts the Court must consider in determining an award of prejudgment interest, and based on a review and analysis of the cases recognizing the intent of an award of prejudgment interest to make the Plaintiffs whole and to provide them for the lost use of their money from the date of the acts complained of. A review and analysis of the prime rate (10.15%) and the commercial market interest rates during the appropriate period of time, and consideration of what Plaintiffs could reasonably have expected to earn by a similar type of investment during this period of time, mandate that the interest calculation applying a constant 7% rate is far too small and would not compensate the Plaintiffs for the loss of the use of their money. This case is in a unique situation due to the comparative states of the commercial market rates from the time of the acts complained to the date of judgment.

CONCLUSION

For all the above reasons and based on the record in this case, Plaintiffs respectfully request the Court to award the prejudgment interest from September 8, 1969 to the date of Judgment, January 30, 1985.

Respectfully submitted,

/s/_____
PAUL WEBB, JR.
Georgia State Bar No. 744650

/s/_____
HAROLD T. DANIEL, JR.
Georgia State Bar No. 204000

/s/_____
KEITH M. WIENER
Georgia State Bar No. 757475
Attorneys for Plaintiffs

Of Counsel

WEBB & DANIEL
1901 Peachtree Center Cain Tower
229 Peachtree Street, N.E.
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(404) 522-8841

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a true and correct copy of the foregoing Brief In Support of Plaintiffs' Motion for Award of Pre-Judgment Interest to all counsel of record by depositing a copy of same in the United States mail, with adequate postage affixed thereto, addressed as follows:

Philip R. Russ, Esq.
1005 Texas American Bank Building
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Alston & Bird
1200 C&S National Bank Building
35 Broad Street
Atlanta, Georgia 30335

This 11 day of February, 1985.

/s/_____
KEITH M. WIENER
Georgia State Bar No. 757475
Attorney for Plaintiffs

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	FILE NO.
E. T. BARWICK INDUSTRIES, INC., et al.,	)	C75-1728A
	)	
	)	(Filed March
Defendants.	)	1, 1985)

NOTICE OF APPEAL

Notice is hereby given that Myles Osterneck, Guy Kenneth Osterneck and Robert Osterneck, and Myles Osterneck and Guy Kenneth Osterneck as Trustees for the benefit of Robert Osterneck, Plaintiffs in the above-styled action, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the final Judgment entered in this action on the 30th day of January, 1985 in favor of Defendant E. T. Barwick and against the Plaintiffs on all claims and in favor of Defendant Ernst & Whinney and against the Plaintiffs on all claims, and from all previous non-final or interlocutory orders and all rulings which produced and preceded the final Judgment.

Dated: March 1, 1985

Respectfully submitted,

/s/ Paul Webb, Jr.
By /s/ Harold T. Daniel, Jr.
Georgia State Bar No. 744650

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al.,	)	
	)	
Plaintiffs	)	
	)	CIVIL ACTION
vs.	)	
	)	FILE NO. C75-
E.T. BARWICK INDUSTRIES, INC., et al.,	)	1728A
	)	
	)	
Defendants	)	

ORDER OF COURT

(Filed May 1, 1985)

On January 30, 1985, a judgment was entered in favor of defendant E. T. Barwick. On March 25, 1985, defendant Barwick filed a motion for extension of time to file his bill of costs. Barwick requests that the court extend the time for filing his bill of costs up to and including May 1, 1985.

Plaintiffs oppose said motion. Plaintiffs point out that Local Rule 255-7 provides:

> A bill of costs must be filed by the prevailing party within 30 days after the entry of judgment. A bill of costs which is not timely filed will result in costs not being taxed as a part of the judgment.

Local rules of practice, such as Rule 255-7, "have the force and effect of law, and are binding upon the parties and the court which promulgated them until they are changed in the appropriate manner." *Woods Construction Co., Inc. v. Atlas Chemical Industries, Inc.*, 337 F.2d 888, 890 (10th Cir. 1964) (citations omitted).

Defendant Barwick's motion was filed 24 days after the date on which the bill of costs "must" have been filed. Additionally, Barwick did not seek an extension of time for compliance with Rule 255-7 until well after the date upon which the bill of costs was to have been filed. There is no doubt that Barwick failed to comply with the requirements of Local Rule 255-7. The time period established by Local Rule 255-7 is designed to provide a time limit for the conclusion of litigation in the trial court, is necessary for the orderly administration of cases, and is binding upon the parties. *In re Pin Oaks Apartments, Alleged Partnership,* 14 B.R. 16, 17 (S.D.Tex. 1981); *Woods Construction Co., Inc.,* 337 F.2d at 891. *Compare J.T. Gibbons, Inc. v. Crawford Fitting Co.,* 102 F.R.D. 73, 77 (E.D.La. 1984) (untimely bill of costs permitted where case "not governed by any local rule").

Accordingly, defendant E. T. Barwick's motion for extension of time to file his bill of costs is hereby DENIED.[1]

SO ORDERED, this 29th day of April, 1986.

/s/ Horace T. Ward
HORACE T. WARD
UNITED STATES DISTRICT
JUDGE

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[1] Plaintiffs were granted an extension of time to file their bill of costs in this action. However, said extension was granted pursuant to a consent motion and order which was filed prior to the expiration of the thirty-day limit set forth in Rule 255-7. Both of these facts distinguish the court's ruling with respect to plaintiffs' motion from the court's ruling as set forth hereinabove.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 85-8165

MYLES OSTERNECK, et al.,

Plaintiffs/Appellants,

v.

EUGENE BARWICK and ERNST & WHINNEY,

Defendants/Appellees,

B.A. TALLEY, M.E. KELLAR, and
E.T. BARWICK INDUSTRIES, INC.,

Defendants/Appellants,

v.

MYLES OSTERNECK, et al.,

Plaintiffs/Appellees/
Cross-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF GEORGIA

STIPULATION OF DEFENDANT/APPELLANTS
KELLAR AND TALLEY THAT PLAINTIFFS'
MARCH 15, 1985 NOTICE OF CROSS-APPEAL
WAS TIMELY FILED AND THAT THIS
COURT HAS JURISDICTION

It is the position of Defendant/Appellants Buford A. Talley ("Talley") and M.E. Kellar ("Kellar") that the Cross-Appeal filed by the Plaintiffs/Appellees/Cross-Appellants (the "Osternecks") on March 15, 1985 in the above-styled action was timely filed in accordance with the Federal Rules of Appellate Procedure. Defendant/

Appellants Talley and Kellar do not object to and stipulate that this Court has jurisdiction of the Cross-Appeal filed by the Osternecks on March 15, 1985.

This 6th day of May, 1985.

STIPULATED TO BY:

/s/ R. Hal Meeks, Jr.
R. Hal Meeks, Jr.
Georgia State Bar No. 500825
Attorney for Defendant/Appellant
Buford A. Talley

Peterson Young Self & Asselin
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/s/ Susan Hoy by RHN
by/express permission
Susan Hoy
Georgia State Bar No. 372850
Attorney for Defendant/Appellant
M. E. Kellar

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al., Plaintiffs	)	CIVIL ACTION
vs.	)	FILE NO. C75-1728A
E.T. BARWICK INDUSTRIES INC., et al., Defendants.	)	

ORDER OF COURT

(Filed July 1, 1985)

On January 30, 1985, a judgment in the amount of $2,632,234.00 was entered in favor of the plaintiffs and against defendants E. T. Barwick Industries, Inc., M. E. Kellar, and B. A. Talley on federal securities law claims and state common law claims. At that time the plaintiffs requested that the court add prejudgment interest to that amount. The court deferred ruling on the matter of prejudgment interest and directed the parties to brief the issue. The parties have briefed the issue of prejudgment interest, and the court is now prepared to issue its ruling on plaintiffs' motion for award of prejudgment interest.

Defendants oppose plaintiffs' request for prejudgment interest, and in the alternative, argue that if it is allowed, any amount awarded should be less than the amount claimed by the plaintiff. Defendants further argue that whether prejudgment interest should be awarded should be determined by reference to Georgia law. It is

clear that "[i]n determining whether prejudgment interest is allowed on damages pursuant to Rule 10b-5, federal law governs." *Wolf v. Frank*, 477 F.2d 467, 479 (5th Cir.), *reh'g denied*, 478 F.2d 1403, *cert. denied*, 414 U.S. 975, *reh'g denied*, 414 U.S. 1104 (1973). *See also Alley v. Miramon*, 614 F.2d 1372, 1381 n.18 (5th Cir. 1980); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 560 (5th Cir. 1981), *aff'd in part and rev'd in part on other grounds*, 103 S.Ct. 683 (1983); *Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith*, 595 F. Supp. 171, 172 (M.D.Fla. 1984). It is also clear that "whether prejudgment interest should be awarded on a damage recovery in a Rule 10b-5 action is a question of fairness resting within the District Court's sound discretion." *Wolf v. Frank*, 477 F.2d at 479.[1] Defendants' reliance on *United States ex rel. Georgia Electrical Supply v. U.S. Fidelity & Guaranty Co.*, 656 F.2d 993 (5th Cir. 1981), and other cases which suggest that state law (and the interest-on-liquidated-damages-only rule) provides the standard by which prejudgment interest should be awarded, is misplaced as those cases did not arise in the context of federal securities law violations but involved other federal statutes and causes of action thereunder.

Plaintiffs contend that the interest should be calculated for the period September 8, 1969 to January 30, 1985 (date of merger to date of judgment). The plaintiffs have suggested ten alternative rates at which prejudgment in-

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[1] As to the state law claims, however, Georgia law governs. *George R. Hall, Inc. v. Superior Trucking Company, Inc.*, 532 F. Supp. 985, 998 (N.D.Ga. 1982). In the instant case, involving unliquidated damages, prejudgment interest on a state law claim is precluded by Georgia law. *See* O.C.G.A. § 51-12-14.

terest might be calculated. This is a matter about which there has been considerable discussion. "Most cases do not explain the reason for use of a particular interest rate, but merely adopt the state interest rate without further discussion." Jacobs, *The Measure of Damages in Rule 10b-5 Cases*, 65 Georgetown L.Rev. 1093, 1161 (1977). Further, the cases show a wide range in the amount of interest awarded. *Id.* at 1161 n. 369. The alternative interest rates presented by the plaintiffs would result in prejudgment interest calculations ranging from a low of $2,836,536.63 (7% simple interest) to a high of $7,580,099.59 (three-month certificates of deposits compounded). *See* Appendix A attached thereto.

As stated in *Wolf v. Frank, supra*, the matter as to whether or not to award prejudgment interest in a federal securities fraud case rests in the sound discretion of the district court, and any ruling on the issue should be based upon fundamental considerations of fairness. An award of prejudgment interest is a part of compensatory damages, but the compensatory nature of such an award must be "tempered by an assessment of the equities." *Norte & Co. v. Huffines*, 416 F.2d 1189, 1191 (2nd Cir. 1969). In awarding prejudgment interest, the district court must take care to determine that such an award is not punitive in nature. *See Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 516 F.2d 172 (2nd Cir. 1975).

The court has determined that upon a consideration of the facts and circumstances herein involved that an award

of prejudgment interest in this case is in order,[2] but in an amount considerably less than that claimed by the plaintiffs. The court further concludes that any award of prejudgment interest in an amount in excess of the jury award of damages or for the full period claimed (approximately fifteen years) would be *punitive* rather than compensatory. In the first instance, much of the delay in getting this case in a posture where it could be presented to a jury can be attributed to the plaintiffs. There was some delay on the part of the plaintiffs in filing the law suit after they were put on notice that a cause of action existed. Also, the lawsuit was pending for a period of nine years from the filing to the beginning of the trial. A substantial part of the delay can be attributed to the actions or lack of action on the part of the plaintiffs. It should be noted that the plaintiffs changed lead counsel two times after the original lead counsel withdrew from the case. This is not to say that other delay was not caused by action or failure to act by various defendants. There are also examples of delay in the progress of bringing this case to trial which were agreed upon by the parties. There was tacit agreement between the parties that action of the district court on certain motions be stayed for a period of time pending a ruling by the Court of Appeals on an issue important to this case. Another matter which contributed to some delay is the fact, that due to changes in

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[2] In an effort to make a party whole, an award of prejudgment interest is particularly appropriate in cases involving investment fraud and breach of fiduciary duties. *See Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith,* 595 F. Supp. 171, 174 (M.D.Fla. 1984) and the cases cited therein at p. 174.

judicial personnel in this district, this case has been assigned to five different district judges at various times.

The court agrees with the plaintiffs that the overall period of time involved in any interest calculation is from September 8, 1969 to January 30, 1985 (date of merger to date of judgment).

Upon giving due consideration to the ten alternate rates of interest presented by the plaintiffs, the court is persuaded that only the use of the constant 7% (simple) interest rate would be fair and reasonable in this case, given the protracted period of time involved.[3] In effect, the court has determined that the Georgia statutory rate is more appropriate than the other rates suggested by the plaintiffs. *See* O.C.G.A. § 7-4-2. In order that the award of prejudgment interest in this case not be deemed to be punitive in nature, the court further determines that an award of only one-third of the total amount arrived at by applying the interest rate of 7% to the jury award for the full period of time may be recovered. Accordingly, the plaintiffs are entitled to recover as prejudgment interest on the federal securities claim in the amount of $945,-512.85. Due to the unliquidated nature of plaintiffs' claims, the plaintiffs are not entitled to recover prejudgment interest on the amount awarded under the Georgia common law fraud claim.

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[3] In making the ruling hereinabove as to the rate interest to be applied in this case, the court is not unmindful of the cases cited in Part III of plaintiffs' brief, such as *Johns Hopkins University v. Hutton,* 297 F. Supp. 1165 (D.Md. 1968) and like cases. The court has simply determined that the average money market approach is not appropriate in this case.

It is hereby ORDERED and ADJUDGED that plaintiffs shall recover of defendants E. T. Barwick Industries, Inc., M. E. Kellar, and B. A. Talley an award of prejudgment interest in the amount of Nine Hundred Forty-Five Thousand Five Hundred Twelve Dollars and Eighty-Five Cents ($945,512.85). Therefore, final judgment in this case shall be AMENDED to reflect this additional award of prejudgment interest on the federal securities claim.

SO ORDERED, this 1st day of July, 1985.

/s/ Horace T. Ward
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MILES OSTERNECK, GUY-KENNETH OSTERNECK, ROBERT OSTERNECK, MYLES OSTERNECK and GUY-KENNETH OSTERNECK AS TRUSTEES FOR THE BENEFIT OF ROBERT OSTERNECK,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	NO. C75-1728A
E.T. BARWICK INDUSTRIES, INC., E.T. BARWICK, M.E. KELLAR, B.A. TALLEY and ERNEST AND ERNEST,	)	
Defendants.	)	

AMENDED JUDGMENT

The judgment heretofore entered in the above-stated case on January 30, 1985, is hereby amended by adding thereto "that plaintiffs, MILES OSTERNECK, GUY-KENNETH OSTERNECK, ROBERT OSTERNECK, MYLES OSTERNECK and GUY-KENNETH OSTERNECK AS TRUSTEES FOR THE BENEFIT OF ROBERT OSTERNECK, shall recover of defendants, E. T. BARWICK INDUSTRIES, INC., M. E. KELLAR, and B. A. TALLEY an award of prejudgment interest in the amount of NINE HUNDRED FORTY-FIVE THOUSAND FIVE HUNDRED TWELVE and 85/100 DOLLARS ($945,512.85) on the federal securities claim", and that said judgment remain the same in every other respect.

Dated at Atlanta, Georgia, this 9th day of July, 1985.

FILED AND ENTERED
IN CLERK'S OFFICE
JULY 9, 1985
LUTHER D. THOMAS, Clerk
By /s/ B. D. Hatcher
Deputy Clerk

LUTHER D. THOMAS, Clerk
By: /s/ Barbara D. Hatcher
Deputy Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	FILE NO.
E. T. BARWICK	)	C75-1728A
INDUSTRIES, INC., et al.,	)	
	)	(Filed July
Defendants.	)	31, 1985)

NOTICE OF CROSS-APPEAL AGAINST M. E. KELLAR, BUFORD A. TALLEY, E. T. BARWICK INDUSTRIES, INC., AND E. T. BARWICK FROM THAT PORTION OF THE COURT'S ORDERS AND AMENDED JUDGMENT WHICH PROVIDE THE PREJUDGMENT INTEREST & COSTS AWARDED TO PLAINTIFFS

NOTICE IS HEREBY GIVEN that Myles Osterneck, Guy Kenneth Osterneck and Robert Osterneck, and Myles Osterneck and Guy Kenneth Osterneck as Trustees for the benefit of Robert Osterneck, Plaintiffs in the above-styled action, hereby cross-appeal against M. E. Keller, Buford A. Talley, E. T. Barwick Industries, Inc. and E. T. Barwick to the United States Court of Appeals for the Eleventh Circuit, from the portions of the Court's Orders dated July 1, 1985 which provide the interest and costs warded to Plaintiffs regarding Plaintiffs' Motion for Prejudgment Interest and Bill of Costs, from that portion

of the Amended Judgment filed and entered on July 9, 1985 which provides the prejudgment interest awarded to Plaintiffs and from all previous non-final or interlocutory orders and all rulings which produced and preceded these Orders and Judgments.

This 31 day of July, 1985.

Respectfully submitted,

/s/ Paul Webb, Jr.
Georgia State Bar No. 744650

/s/ Harold T. Daniel, Jr.
By /s/ KW
Georgia State Bar No. 204000

/s/ Keith M. Wiener
Georgia State Bar No. 757475
Attorneys for Plaintiffs

Of Counsel:

Webb & Daniel
1901 Peachtree Center Cain Tower
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Atlanta, Georgia 30303
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8165, 85-8523 & 85-8593

MYLES OSTERNECK, et al.,	Plaintiffs-Appellants, Cross-Appellees,
versus	
E.T. BARWICK INDUSTRIES,	Defendant-Appellee, Cross-Appellant,
E.T. BARWICK,	Defendant,
M.E. KELLAR,	Defendant-Appellee, Cross-Appellant,
BUFORD TALLEY,	Defendant-Appellee, Cross-Appellant,
ERNST & WHINNEY,	Defendant-Appellee, Cross-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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(Filed Oct. 30, 1985)

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

The jurisdictional questions are carried with the cases.

Myles OSTERNECK, et al.,
Plaintiffs-Appellees,

v.

E.T. BARWICK INDUSTRIES, INC., et al.,
Defendants.

Ernst & Whinney, Defendant-Appellant.

Myles OSTERNECK, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

v.

E.T. BARWICK INDUSTRIES, INC., et al.,
Defendants,

Melvin E. Kellar and Buford A. Talley,
Defendants-Appellants, Cross-Appellees.

Myles OSTERNECK, et al.,
Plaintiffs-Appellants,
Cross-Appellees,

v.

E.T. BARWICK INDUSTRIES, INC.,
Defendant.

E.T. Barwick, Defendants,

M.E. Kellar, Defendant-Appellant,
Cross-Appellee,

Buford Talley, Defendant-Appellant,
Cross-Appellant.

Ernst & Whinney, Defendant-Appellee,
Cross-Appellant.

Nos. 85-8523, 85-8593 and 85-8165.

United States Court of Appeals,
Eleventh Circuit.

Aug. 31, 1987.

Appeals from the United States District Court for the Northern District of Georgia.

Before HATCHETT and ANDERSON, Circiut Judges, and TUTTLE, Senior Circuit Judge.

ANDERSON, Circuit Judge:

Over seventeen years ago, in September 1969, Cavalier Bag Company, Inc., merged into E.T. Barwick Industries, a subsidiary of the Barwick Corporation. Various members of the Osterneck family, plaintiffs in this action, were, at that time, owners of Cavalier. Pursuant to the merger, the Osternecks exchanged their stock in Cavalier for Barwick Industries stock.

Sometime later the Osternecks became aware of allegedly frudulent misrepresentations made to them in order to secure their approval of the merger. Specifically, they came to believe that Barwick Industries' financial statements for the two years preceding the merger misrepresented the company's financial condition. Consequently, on September 4, 1975, the Osternecks began this action alleging violations of §§ 10(b) and 20 of the Securities Act of 1934 (15 U.S.C. §§ 78j(b), 78t), Rule 10(b)(5) thereunder (17 C.F.R. § 240.10b-5) and the common law of Georgia.

Besides Barwick Industries, the Osternecks named as defendants several other individuals and organizations. Of these only four remain parties to this appeal: E.T. Barwick, B.A. Talley, and M.E. Kellar, who were directors and officers of Barwick Industries prior to or during the merger and Ernst & Whinney ("E & W"), the accountants responsible for preparing the allegedly fraudulent statements misrepresenting the financial condition of Barwick Industries.[1]

Following almost ten years of discovery, this case finally went to trial in October, 1984. After three and a

1. The financial statements were actually prepared by Ernst & Ernst. Since that time, however, the accounting firm has changed its name to Ernst & Whinney.

half months of testimony, the jury returned a verdict against defendants Barwick Industries, M.E. Kellar, and B.A. Talley in the amount of $2,632,234 as compensatory damages for violations of federal securities law and Georgia state common law. Judgment was entered in favor of E & W and E.T. Barwick, individually. Subsequently, the district court awarded the Osternecks pre-judgment interest on their federal securities claim in the amount of $945,512.85. These consolidated appeals ensued.

Tangled procedural maneuvering has created three separate appellate cases. For clarity's sake we briefly characterize them here: Case No. 85-8165 involves the Osternecks' appeal from all judgments rendered against them and includes the cross-appeals of most of the defendants. Case No. 85-8593 involves only the appeal by Barwick Industries, E.T. Barwick, Talley and Kellar and the Osternecks' cross-appeal against those parties. Case No. 85-8523 is an appeal by E & W from the district court's denial of expert fees in E & W's bill of costs.

I. JURISDICTION

As an initial matter, we confront several difficult jurisdictional questions. These difficulties arise out of the complicated procedural maneuvering which occurred following the initial entry of judgment against defendants Barwick Industries, Kellar and Talley. This first judgment for over two and a half million dollars was entered on January 30, 1985. At that time the Osternecks moved orally for the award of pre-judgment interest. On February 11, 1985, the Osternecks filed a written motion for prejudgment interest. During March 1985, the various parties filed notices of appeal and cross-appeal chal-

lenging the Janaury 30, 1985 judgment, including the Osternecks' March 1, 1985 notice of appeal.[2] It was not, however, until July 1 that the district court entered an order ruling upon the Osternecks' February 11 motion and awarding the Osternecks over $945,000 in prejudgment interest. A separate judgment, captioned as an "amended judgment," was entered on July 9. Following this amended judgment various notices of appeal and cross-appeal were filed. The Osternecks' filed only a single notice of appeal on July 31, 1985, which was captioned as a cross-appeal against Kellar, Talley, E.T. Barwick and Barwick Industries. The notice did not designate E & W as a party to the appeal.[3]

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2. In addition to the Osternecks' notice of appeal, Talley and Kellar also filed notices of appeal on March 1, 1985. On March 15, E & W filed a cross-appeal against the Osternecks and the Osternecks cross-appealed against Talley and Kellar. On March 28, the Osternecks cross-appealed against Barwick Industries.

3. In full, the notice of appeal read:

NOTICE OF CROSS-APPEAL AGAINST M.E. KELLAR, BUFORD A. TALLEY, E.T. BARWICK INDUSTRIES, INC., AND E.T. BARWICK FROM THAT PORTION OF THE COURT'S ORDERS AND AMENDED JUDGMENT WHICH PROVIDE THE PREJUDGMENT INTEREST AND COSTS AWARDED TO PLAINTIFFS

NOTICE IS HEREBY GIVEN that Myles Osterneck, Guy Kenneth Osterneck, and Robert Osterneck, and Myles Osterneck and Guy Kenneth Osterneck as Trustees for the benefit of Robert Osterneck, Plaintiffs in the above-styled action, hereby cross-appeal against M.E. Kellar, Buford A. Talley, E.T. Barwick Industries, Inc. and E.T. Barwick to the United States Court of Appeals for the Eleventh Circuit, from the portions of the Court's orders dated July 1, 1985 which provide the interest and costs awarded to Plaintiffs regarding Plaintiffs' Motion for Prejudgment Interest and

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A. *Cases Nos. 85-8165 & 85-8593*

These cases raise two interrelated jurisdictional issues. First, we must examine the effect and validity of the Osternecks' March 1, 1985 notice of appeal, and the other appeals and cross-appeals filed by the defendants during March 1985. The parties agree that if these notices were effective they would be sufficient to raise all issues the Osternecks seek to litigate on appeal. However, defendants Talley, Kellar, and E & W contend that these notices were ineffective because they were filed while a Rule 59(e) motion was pending before the district court. If the Osternecks' March 1, 1985 notice of appeal, and the other appeals and crossappeals filed in March 1985 are deemed ineffective, we must next decide whether the Osternecks' second notice of appeal filed on July 31, 1985, effectively preserved all issues for appeal.[4] Defendants Talley, Kellar, and E & W argue that this second notice of appeal did not preserve all the issues which the Osternecks now seek to litigate.[5]

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Bill of Costs, from that portion of the Amended Judgment filed and entered on July 9, 1985 which provides the prejudgment interest awarded to Plaintiffs and from all previous non-final or interelocutory orders and all rulings which produced and preceded these Orders and Judgments.

This 31 day of July, 1985.

Record on Appeal, vol. 24, Tab 511.

4. It is uncontested that the appellants Barwick Industries, E.T. Barwick, Talley and Kellar filed effective, timely second notices thereby preserving their appeals. As will appear below, however, E & W has foregone its right to appeal.

5. The Osternecks argue that the defendants are estopped to deny this court's jurisdiction, having originally conceded that jurisdiction for this appeal existed. However, it is well settled

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It is settled law that a notice of appeal filed while a motion to alter or amend the judgment under Rule 59(e) is pending can have no effect. *See* Fed.R.App.P. 4(a)(4);[6] *see also Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982); *Robinson v. Tanner*, 798 F.2d 1378, 1385 (11th Cir.1986). Thus, the jurisdictional question posed by this case is a clear one: should the Osternecks' February 11 motion for prejudgment interest be characterized as a motion, pursuant to Fed.R.Civ.P. 59(e), to alter or amend the district court's judgment. Because we conclude that this motion for discretionary prejdugment interest is properly characterized as a motion to alter or amend a final judgment of the district court, all notices filed in this case prior to the ruling on that motion, i.e., July 9, 1985, have no effect.

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that, as courts of limited jurisdiction, federal courts are obliged to undertake a jurisdictional inquiry whenever it appears that, in fact, no jurisdiction exists. *Blake v. Zant*, 737 F.2d 925, 926 (11th Cir.1984), *on reh'g*, 758 F.2d 523, *cert. denied*, — U.S. —, 106 S.Ct. 374, 88 L.Ed.2d 367 (1985); *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1102 (5th Cir.1981). Thus, any prior stipulation by the parties notwithstanding, the issue of our jurisdiction is now before us and must be addressed.

6. In relevant part, this rule reads:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . under Rule 59 . . . the time for appeal for all parties shall run from the entry of the order . . . granting or denying . . . such motion. A notice of appeal filed before the disposition of [a Rule 59 motion] shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion. . . .

Fed.R.App.P. 4(a)(4).

Our conclusion that a motion for prejudgment interest is a Rule 59(e) motion is influenced by several factors. First and foremost amongst these is the settled treatment of such motions by the other circuit courts of appeal They have uniformly concluded that a motion for discretionary prejudgment interest must be filed pursuant to Rule 59(e). *See Stern v. Shouldice*, 706 F.2d 742, 746-47 (6th Cir.), *cert. denied*, 464 U.S. 993, 104 S.Ct. 487, 78 L.Ed.2d 683 (1983); *Goodman v. Heublein, Inc.*, 682 F.2d 44, 45-47 (2d Cir.1982); *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147, 152-54 (1st Cir.1980).

This result may be easily explained. The discretionary award of prejudgment interest requires the district court to substantively reconsider its original judgment. This is precisely the sort of alteration or amendment contemplated by Rule 59(e). Such substantive modifications must be sought within ten days of the entry of judgment[7] and any decision rendered prior to disposition of the motion is not final for purposes of appeal. The rules of appellate procedure are designed to prevent precisely what has occrured in this case—the piecemeal appeal of non-final substantive judgments rendered by the district court.[8]

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7. The Osternecks' motion, served on February 11, 1985, was served within the ten-day time limit prescribed by Fed.R.Civ.P. 59(e). The tenth day after judgment actually fell on Saturday, February 9, and an extension until Monday was proper. Fed. R.Civ.P. 6(a).

8. One narrow exception to the general rule that motions for prejudgment interest should be treated under Rule 59(e) may exist. When the substantive law upon which the district court's judgment is based mandates an award of prejudgment

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The Osternecks argue, however, that their motion is not within the scope of Rule 59(e) because it addresses an issue collateral to the main cause of action. As support for this proposition, they cite *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982), in which the Supreme Court held that a post-judgment motion for an award of attorney's fees under 42 U.S.C. § 1988 was not governed by Rule 59(e).

Reliance upon *White* is misplaced. In *White*, the Court noted that an award of attorney's fees under § 1988 is "uniquely separable" from the main cause of action and, " 'does not imply a change in the judgment.' " *Id.* at 452, 102 S.Ct. at 1166 (quoting *Knighton v. Watkins*, 616

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interest, its omission from the judgment may be corrected as a clerical error by motion brought pursuant to Fed.R.Civ.P. 60(a). *See Glick v. White Motor Co.*, 458 F.2d 1287, 1293-94 (3d Cir.1972). The discretionary award of prejudgment interest can never fall within this exception. *See Goodman*, 682 F.2d at 45-46; *Scola*, 618 F.2d at 153. As the Osternecks have conceded, the award of prejudgment interest in this case was wholly within the district court's discretion. Neither the federal securities law nor the state common law fraud claims litigated by the Osternecks mandated the award of prejudgment interest. *See, e.g., Blau v. Lehman*, 368 U.S. 403, 414, 82 S.Ct. 451, 457, 7 L.Ed.2d 403 (1962); *Hembree v. Georgia Power Co.*, 637 F.2d 423, 429-30 (5th Cir.1981). Moreover, to the extent that any such exception to the general rule exists, the former Fifth Circuit has, in dicta, rejected this exception. *Warner v. City of Bay St. Louis*, 526 F.2d 1211, 1213 n. 4 (5th Cir.1976) ("To the degree these cases hold that interest which is added as a matter of right can always be corrected under Rule 60(a), we believe they should be rejected.") (binding precedent, *see infra* note 10). Of course, when an improper legal rate of interest is set by the district court, a party may also seek relief from the legally erroneous judgment under Rule 60(b). *Id.* at 1212-13.

F.2d 795, 797 (5th Cir.1980)). Our circuit has interpreted this to mean that Rule 59(e) applies only when a motion seeks reconsideration of substantive issues resolved in the judgment and not when a motion raises exclusively collateral questions regarding what is due because of the judgment. *See Lucas v. Florida Power & Light Co.*, 729 F.2d 1300, 1301 (11th Cir.1984). Thus, we have even concluded that the issue of attorney's fees is not always collateral to the action. When the liability for the award arises from a substantive contractual obligation and is "an integral part of the merits of the case" and therefore " 'compensation for the injury giving rise to an action,' " a motion for the inclusion of attorney's fees is a Rule 59(e) motion and tolls the time period for appeal. *C.I.T. Corp. v. Nelson*, 743 F.2d 774, 775 (11th Cir.1984) (quoting *White*, 455 U.S. at 452, 102 S.Ct. at 1166-67); *accord Beckwith Machinery Co. v. Travelers Indemnity Co.*, 815 F.2d 286 (3d Cir.1987). *But see Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 282-94 (7th Cir.1985).

It cannot be doubted that prejudgment interest is compensation which directly stems from the injury giving rise to the action. *Norte & Co. v. Huffines*, 416 F.2d 1189, 1191 (2d Cir.1969); *cert. denied*, 397 U.S. 989, 90 S.Ct. 1121, 25 L.Ed.2d 396 (1970). Thus, a motion to award prejudgment interest requests a substantive alteration of a court's judgment and must be made pursuant to Rule 59(e). Hence, in the instant case, the district court's judgment was not made final until the entry of its

amended judgment on July 9, 1985, and all notices of appeal filed prior to that date were ineffective.[9]

In order to avoid the effects of this ruling, the Osternecks argue that their original notices of appeal and cross-appeal filed in March are, nonetheless, effective because they fall within the scope of two special exceptions which validate premature notices of appeal. First, they argue that an interlocutory appeal from a nonfinal decision may, nonetheless, be treated as an appeal from a final order if the nonfinal judgment has subsequently been finalized. *See Jetco Electric Industries, Inc. v. Gardiner*, 473 F.2d 1228, 1231 (5th Cir.1973);[10] *cf. Anderson v. Allstate Insurance Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980). However, *Jetco* holds only that a "premature notice of appeal is valid if filed from an order dismissing a claim or party and followed by a subsequent final judgment without a new notice of appeal being filed. *Robinson*, 798 F.2d at 1385 (footnote omitted). In this case, the earlier nonfinal order was not one which dismissed a

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9. As an alternative to this resolution, E & W urges us to adopt the per se rule recently announced by the Fifth Circuit in *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665 (5th Cir.) (en banc), *cert. denied*, — U.S. —, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986). That court concluded that any post-judgment motion served within ten days of the entry of judgment (except a motion to correct purely clerical errors under Rule 60(a)) would be treated as a motion under Rule 59(e). *Id.* at 667. Absent en banc reconsideration by our own court, we are not free to adopt this bright line rule. Moreover, our own distinction between collateral and noncollateral matters is sufficient for the purpose at hand and achieves the same result as that suggested by *Horcan's* per se rule.

10. This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

claim or a party. Rather, it only rendered judgment upon a jury verdict. Thus, the Osternecks' premature appeal does not fall within the scope of the *Jetco* rule. Moreover, in *Martin v. Campbell*, 692 F.2d 112, 114-16 (11th Cir. 1982), this court determined that *Jetco* could not validate a premature notice of appeal which was filed while a Rule 59 motion was pending. We concluded that Fed.R.App.P. 4(a)(4) spoke directly to the validity of such appeals and precluded validation of a premature notice under *Jetco's* equitable exception.

As a final argument, the Osternecks contend that they fall within the "unique circumstances" exception to the timely appeal requirement. This exception, developed by the Supreme Court in *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964) (per curiam), commands that an appellate court "should hear an appeal even though it is not timely, if the appellant reasonably relied on an erroneous statement of the district court that the appeal . . . was timely, and the appeal would have been timely if the district court had been correct." *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 111 n. 2 (7th Cir. 1985) (citation omitted).

The Osternecks contend that they have relied upon several actions of the district court which indicated that the January 30, 1985 judgment was final and appealable. These include the district court's subsequent orders granting E & W's bill of costs, denying E.T. Barwick's motion for an extension of time to file its bill of costs, and denying E.T. Barwick Industries' motion to stay the executions of the January 30 judgment. In addition, the clerk of the district court required the Osternecks to pay an additional filing fee for their notice of cross-appeal filed after the

district court's July 9 amended judgment. The Osternecks argue that this requirement indicates that the clerk did not treat the Osternecks' motion for prejudgment interest as a motion under Rule 59. Had the clerk believed that a Rule 59 motion had been made he would have acted pursuant to Fed.R.App.P. 4(a)(4) which provides that no additional fees shall be required for a second notice of appeal filed after a Rule 59 motion has been ruled upon. Finally, the Osternecks contend that they relied upon this court's failure to originally notify them that jurisdiction was questionable.

We do not believe that any of these factors are sufficient to create the "unique circumstances" necessary to validate a premature appeal. At no time has the district court or this court every affirmatively represented to the Osternecks that their appeal was timely filed, nor did the Osternecks ever seek such an assurance from either court. Indeed, the *Thompson* exception is designed to permit an appeal when a party has done an act which, if properly done, would postpone the deadline for filing his appeal and has been assured by a judicial officer that this act has been properly done. *Thompson*, 375 U.S. at 387. The Osternecks do not suggest that any court officer has ever assured them that they have been granted an extension of time within which to file an appeal.[11]

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11. Moreover, to the extent the Osternecks may have erroneously relied upon the actions of the district court, they did so despite the district court's express statements that the judgment would have to be "amended" to include prejudgment interest. See Record on Appeal, vol. 82 at 8497 ("if prejudgment interest is granted it will be—the judgment can be amended"); *cf. id.* vol. 24, Tab 508 (entering "amended judgment" awarding prejudgment interest). Rule 59(e) is, of course, the only vehicle by which prior district court judgments may be "amended."

For the foregoing reasons, we conclude that we do not have jurisdiction to hear the appeal in Case No. 85-8165 (i.e., the Osternecks' March 1, 1985 appeal and the defendants' cross-appeal during March 1985). That appeal is accordingly ordered dismissed.[12]

Having concluded that all of the notices of appeal filed prior to the district court's amended judgment on July 9, 1985 are ineffective, we must next determine the efficacy of the Osternecks' subsequent notice of cross-appeal filed on July 31, 1985. The Osternecks contend that, even though their appeal in Case No. 85-8165 may be dismissed, all the issues they seek to litigate in that ap-

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12. In an effort to resuscitate their appeal, the Osternecks have made several motions. First, they seem to have requested that we order the district court to grant them an extension of time in which to file their appeal. Though the district court may entertain such a motion, an appellate court is expressly prohibited from enlarging the time for filing a notice of appeal. Fed.R.App.P. 26(b). In the alternative the Osternecks' motion may be construed as a request that this court stay its hand and permit a limited remand so that the district court may determine whether an extension of time is appropriate. This we decline to do. The need for the orderly disposition of appeals indicates that such limited remands are strongly disfavored and the Osternecks have suggested no reason why the district court could not as readily deal with a motion for an extension following our dismissal of the instant appeal. Indeed, there is currently pending before the district court a motion for an extension of time in which to file an appeal. The district court has deferred ruling on this motion pending our disposition of this appeal. *United States v. Hitchmon*, 602 F.2d 689, 692 (5th Cir.1979). Following this dismissal, the district court may entertain the Osternecks' motion. The grant or denial of such a motion is entrusted to the district court's sound discretion. *Wansor v. George Hantscho Co.*, 570 F.2d 1202, 1205-07 (5th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 350, 58 L.Ed.2d 344 (1978); *In re O.P.M. Leasing Services*, 769 F.2d 911 (2d Cir.1985).

peal are preserved for litigation in Case No. 85-8593 by their July 31 notice. By its terms, however, this notice of cross-appeal does not expressly raise any issues for appeal against E & W. E & W contends that the failure to name them in the notice of appeal renders the notice ineffective insofar as it seeks to raise any issues on appeal against E & W. We agree.

The general rule in this circuit is that an appellate court has jurisdiction to review only those judgments, orders or portions thereof which are specified in an appellant's notice of appeal. *See Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1374-75 (11th Cir.); *cert. denied*, 464 U.S. 893, 104 S.Ct. 239, 78 L.Ed.2d 230 (1983); Fed.R.App.P. 3(c) (requiring that a notice of appeal "designate the judgment, order or part thereof appealed from"). *But see Lynn v. Sheet Metal Workers*, 804 F.2d 1472, 1481 (9th Cir.1986). Although we generally construe a notice of appeal liberally, we will not expand it to include judgments and orders not specified unless the overriding intent to appeal these orders is readily apparent on the face of the notice. We have previously concluded that, where some portions of a judgment and some orders are expressly made a part of the appeal, we must infer that the appelllant did not intend to appeal other unmentioned orders or judgments. *Mestre*, 701 F.2d at 1374-75; *see also C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1055-56 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 974, 71 L.Ed.2d 112 (1981).[13]

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13. This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

We conclude that an analogous rule would apply when an appellant expressly names some of his opponents but fails to include other opposing parties within the notice of appeal. *See Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252 (3d Cir.1977) (depriving appellate jurisdiction with respect to defendants not named in notice of appeal); *Parrish v. Board of Commissioners*, 505 F.2d 12, 15-16 (5th Cir.1974) (notice naming appellants "PARRISH, ET AL., Plaintiffs" sufficient to demonstrate that all plaintiffs intended to appeal), *vacated*, 509 F.2d 540, *reh'g en banc*, 524 F.2d 98 (1975), on remand, 533 F.2d 942, 945 (1976) (deeming issue mooted by filing of curative notice of appeal). Since the text of the Osternecks' July 31, 1985 notice, *see supra* note 3, expressly preserves an appeal against Barwick, Barwick Industries, Talley and Kellar, we must, by inference, conclude that the Osternecks chose to forego any appeal against E & W.

Moreover, to now permit the Osternecks to use their July 31 notice as a vehicle for an appeal against E & W would unfairly prejudice E & W. No doubt relying upon the Osternecks' failure to appeal the judgment in its favor, E & W has foregone any cross-appeal it might have had. A cross-appeal, had one been filed, could have raised many of the issues which we will address in connection with Case No. 85-8593. Indeed, when the Osternecks had earlier appeared to perfect an appeal against E & W by their March 1 notice of appeal, E & W promptly filed a notice of cross-appeal on March 15. Thus, it is evident that E & W has reasonably relied upon the fact that the Osternecks did not name them in their July 31 notice. To allow the Osternecks to now use that notice to raise an appeal against E & W would be inequitable.

Consequently, the issues the Osternecks seek to litigate against E & W are not preserved in Case No. 85-8593.

As our discussion makes plain, however, we do have jurisdiction over Case No. 85-8593, because the notices of appeal were filed after the district court entered its final judgment. The scope of these notices expressly embraces the appeals by Barwick Industries, E.T. Barwick, Talley and Kellar as well as the Osternecks' July 31, 1985 cross-appeal against those parties. Talley and Kellar have argued that the Osternecks' second notice specified only that portion of the final judgment relating to prejudgment interest and thus did not raise against them any issues other than the propriety of the prejudgment interest award expressly mentioned in the notice. We need not address this argument, however, because in this appeal against Talley and Kellar, the Osternecks have briefed only the prejudgment issue and have, consequently, abandoned any other assignments of error against Talley and Kellar. *Harris v. Plastics Manufacturing Co.*, 617 F.2d 438, 440 (5th Cir.1980). All parties agree that the July 31, 1985 notice was sufficient to permit the Osternecks to appeal from the district court's order which awarded prejudgment interest only on the federal securities claim and reduced by two-thirds the amount of interest requested by the Osternecks. Thus, all issues raised by the Osternecks in case No. 85-8593 against Talley and Kellar are properly before us, as well as the issues raised by the Talley and Kellar appeals, and we have jurisdiction to hear the case.[14]

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14. The Osternecks' cross-appeal also names Barwick Industries and E.T. Barwick and manifests an intent to appeal against

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B. *Case No. 85-8523*

This case presents a slightly different issue of appellate jurisdiction. On May 22, 1985, while the Osternecks' motion for prejudgment interest was pending before the district court, the district court ruled on E & W's motion for costs incurred while successfully defending against the Osternecks' action. In this order, the district court concluded that it was without authority to award fees for expert witnesses beyond the nominal statutory amount recoverable under 28 U.S.C. § 1821.[15] On June 21, 1985, E & W appealed from the district court's May 22 order.

Though orders awarding or denying costs are not ordinarily appealable, *Newton v. Consolidated Gas Co.*, 265 U.S. 78, 82-83, 44 S.Ct. 481, 482-83, 68 L.Ed. 909 (1924), when the refusal to tax an item of cost is not based upon an exercise of discretion but rather upon a district court's conclusion that it lacked the power to tax costs that order is appealable. *See McWilliams Dredging Co. v. Department of Highways*, 187 F.2d 61 (5th Cir.

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those parties. Nowhere in their briefs, however, have the Osternecks sought to raise any issue on appeal against Barwick Industries. Nor could they be deemed to have raised any beyond those asserted against Talley and Kellar, Barwick Industries' codefendants. Insofar as the Osternecks' briefs on appeal raise issues challenging the validity of the verdict in favor of E.T. Barwick, those issues are properly presented to us and we have jurisdiction to consider their merits as part of Case No. 85-8593. However, these issues have no merit. *See infra* n. 18.

15. This ruling accords with our circuit's prior decision in *Kivi v. Nationwide Mutual Ins. Co.*, 695 F.2d 1285 (11th Cir.1983). The Supreme Court has recently confirmed that our interpretation of the law is correct. *See Crawford Fitting Co. v. J.T. Gibbons*, — U.S. —, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987).

1951). Moreover, it is evident that an appeal respecting costs is an appeal of a collateral matter which does not seek reconsideration of substantive issues before the court. *Lucas*, 729 F.2d at 1301. Thus, our analysis above suggests that E & W's appeal is of a collateral matter and that a request for costs is not a motion under Rule 59(e).

This, however, does not dispose of the question. Simply because an order, such as an order taxing costs, is generally appealable it does not follow that any particular order is appealable. In this case, the order appealed from was entered prior to the district court's final disposition of all substantive issues in the case. This exactly reverses the typical procedure contemplated by Fed.R.Civ.P. 58, which provides that "[e]ntry of the judgment shall not be delayed for the taxing of costs."

By statutory authority, this court has jurisdiction only of appeals from final decisions of the district courts. 28 U.S.C. § 1291.[16] We may not hear appeals even from fully consummated decisions when they are but steps towards a final judgment into which they merge. We see no reason for concluding that the order taxing costs against the Osternecks was anything but such an intermediate step that merged into the subsequent July 9 final judgment of the district court and was appealable only at that time. Hence, E & W's appeal must be dismissed as an appeal from a nonfinal order of the district court.

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16. This statutory grant of appellate jurisdiction provides that:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts. . . .

28 U.S.C. § 1291.

Nor can E & W seek to avoid the finality rule by application of the *Cohen* doctrine. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) (permitting appeal of certain nonfinal collateral issues). In the first place, it is not at all apparent that the *Cohen* doctrine can ever apply to notices of appeal filed during the pendency of a Rule 59 motion, such as the Osternecks' motion for prejudgment interest in this case. By its very terms, Rule 4(a)(4) mandates that "the time for appeal for *all* parties" shall run from the entry of an order granting or denying a Rule 59 motion. Fed.R.App.P. 4(a)(4) (emphasis supplied). Thus, one might conclude that the express terms of Rule 4(a)(4) render any notice of appeal filed during the pendency of a Rule 59 motion a nullity, no matter what that notice's otherwise appealable character.

We need not sweep so broadly in our ruling, however. Indeed we assume *arguendo* that the *Cohen* doctrine, if applicable, would validate a notice of appeal from a nonfinal collateral order filed during the pendency of a Rule 59 motion. However, it is evident that E & W's appeal of the order taxing costs does not meet the stringent requirements of the *Cohen* doctrine. In order for a nonfinal order to be appealable as a collateral matter under the *Cohen* doctrine, it must be clear that awaiting a timely appeal from the complete final judgment would effectively prevent review of the order in question. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457-58, 57 L.Ed.2d 351 (1978). *Cohen*, 337 U.S. at 546, 69 S.Ct. at 1225-26. No suggestion has been made, nor could one be, that the district court's order taxing costs would be unre-

viewable had E & W awaited final judgment before taking its appeal. Consequently, the *Cohen* doctrine is inapplicable.

For the foregoing reasons we conclude that the appeal in Case No. 85-8523 must be dismissed for want of jurisdiction because it is an appeal from a nonfinal order of the district court.

II. CASE NO. 85-8593—THE MERITS

Having concluded that we have jurisdiction only to determine the merits of Case No. 85-8593, we now turn our attention to the issues presented in that case. No. 85-8593 involves the issue raised by Talley and Kellar in their appeals,[17] and the prejudgment interest issue raised by the Osternecks in their cross-appeal.[18]

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17. Though E.T. Barwick and Barwick Industries filed notices of appeal, those appeals have been dismissed pursuant to Eleventh Circuit Rule 16(b). Hence, the judgment of the district court against Barwick Industries stands, and E.T. Barwick's appeal is abandoned.

18. The Osternecks also assert three claims challenging the verdict in favor of E.T. Barwick: (1) that the court improperly instructed the jury on the scienter requirement for aiding and abetting liability; (2) that the court improperly instructed the jury on the elements of a Rule 10b-5 claim; and (3) that no reasonable jury could have entered a verdict in Barwick's favor.

Any error in the jury instruction on aiding and abetting scienter was harmless. The jury found that Barwick was not primarily liable to the Osternecks under Rule 10b-5. The scienter requirement for 10b-5 is less than the proper scienter requirement for aiding and abetting liability. Accordingly, since the jury found no scienter for the primary liability, it could have found none for secondary liability either. *Cf. Cavalier Carpets, Inc. v. Caylor*, 746 F.2d 749, 758-59 (11th Cir.1984).

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On appeal, Talley argue: (1) that the district court improperly charged the jury with a four-year statute of limitations for the federal securities law claims; (2) that consequently, since prejudgment interest is not available under Georgia law, the award of prejudgment interest made by the district court under the federal securities law must be vacated; (3) that the district court improperly imposed upon him the burden of rebutting the Osternecks' bill of costs; and (4) that the district court erred in allowing his codefendants to cross-examine him when he testified at trial.

Appellant Kellar raises the following issues: (1) that the district court improperly charged a four-year statute of limitations on the federal securities claims; (2) that the district court erred in concluding that fraudulent concealment by third parties would toll the running of the federal securities statute of limitations against him; (3) that there was insufficient evidence to support a judgment that he was liable to the Osternecks on the federal securities claims; and (4) that there was insufficient evidence of scienter to support a judgment against him on the state common law fraud claims.

In reply the Osternecks contend: (1) that Talley and Kellar have waived their right to assign as error the district court's instruction to the jury applying the four-year statute of limitations to the federal securities claim; (2)

(Continued from previous page)

We have closely examined the Osternecks' remaining allegations of error with respect to the verdict in Barwick's favor and find that they are without merit and warrant no discussion.

that any error in charging the jury on the federal securities statute of limitations was harmless; and on cross-appeal the Osternecks contend (3) that the district court abused its discretion in reducing by two-thirds the amount of prejudgment interest awarded to them.

A. *Statute of Limitations for the Federal Securities Claim*

Talley and Kellar assert that the district court committed several errors in determining the statute of limitations applicable to the Osternecks' federal securities claims. If Talley and Kellar had been successful in bringing themselves within the protection of the statute of limitations, thus barring the federal securities claims, the award of prejudgment interest would have to be vacated, since prejudgment interest is not available on the state law claims in this particular case. *See infra*, note 24.

The federal securities laws do not provide a specific statute of limitations for private rights of action asserted under §§ 10(b), 20 and Rule 10b-5. Thus, federal courts are required to borrow the most appropriate statute of limitations from the forum state. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 N. 29, 96 S.Ct. 1375, 1389 n. 29, 47 L.Ed.2d 668 (1976); *Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500, 1502 (11th Cir. 1986).

In this case, the district court originally concluded that the two-year statute of limitations provision of Georgia's Securities Act was applicable. *See Osterneck v. E.T. Barwick Industries, Inc.*, 79 F.R.D. 47, 50-51 (N.D.

Ga.1978) (applying Ga.CodeAnn. § 97-114 (1973).[19] Subsequently, however, the district court accepted the Osternecks' argument that Georgia's four-year statute of limitations for common law fraud was the proper statute of limitations to borrow. In reaching this conclusion, the district court relied upon the district court opinion of Judge Shoob in the *Friedlander* case. *See Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 595 F.Supp. 1442, 1443-52 (N.D.Ga.1984) (applying O.C.G.A. § 9-3-31 (1982),[20] *rev'd*, 788 F.2d 1500 (11th Cir.1986). Thus, when this case was sent to the jury, they were instructed that the suit was timely brought if it was initiated within four years of when the Osternecks knew or reasonably should have known through the exercise of due diligence that they had a cause of action against the defendants.

This instruction also had the effect of tolling the statute of limitations. Even under a four-year statute of limitations, the Osternecks might have been required to begin litigation by September 1973—4 years after the 1969 merger. The court's instruction permitted the jury to conclude that the suit was timely, however, if they found that the Osternecks did not know and through due dili-

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19. The Georgia Securities Act of 1957 is applicable to this case. The alleged fraud occurred in 1969 prior to Georgia's revision of its securities law in 1973. However, the two-year statute of limitations for securities violations in the 1973 law is identical to that in section 13 of the 1957 Act. *See McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888, 892 n. 9 (5th Cir.1979). The 1973 statute has since been recodified. O.C.G.A. § 10-5-14 (1982).

20. This four-year statute of limitations for fraud, codified in 1982, is identical to that in effect in 1969. Ga.Code Ann. § 3-1002.

gence could not have known of the existence of their cause of action before September 4, 1971—the date four years before they filed suit.

Appellants Talley and Kellar now seek a new trial, arguing first that a two-year statute of limitations should properly have been charged to the jury. Because Talley and Kellar failed to object to the jury charges as required by Fed.R.Civ.P. 51, our review is restricted to one of plain error. Since we conclude that the district court's charge was not plainly erroneous, we reject the appellants' assertion that a new trial is necessary.

The law in this circuit is clear. Pursuant to Fed.R.Civ.P. 51, one who wishes to challenge on appeal a district court's instruction to the jury on the ground that it was an erroneous statement of the law must have objected to the instruction at trial. *See Kenney v. Lewis Revels Rare Coins, Inc.*, 741 F.2d 378, 382 (11th Cir.1984). One may not rely on the objections made by co-parties to the action, but, rather must expressly adopt a co-parties objection as his own. *Id.* In the obsence of an objection, a defendant is deemed to have waived his right to assign as error the district court's jury charge. We will depart from this rule only in narrow circumstances when an error is "so fundamental as to result in a miscarriage of justice," *see Barnett v. Housing Authority*, 707 F.2d 1571, 1580 (11th Cir.1983) (quoting *Patton v. Archer*, 590 F.2d 1319, 1322 (5th Cir.1979)), or when the district court's instruction amounts to plain error, *see Barnett*, 707 F.2d at 1581 n. 18; *Johnson v. Bryant*, 671 F.2d 1276, 1281 (11th Cir.1982). *But see Williams v. Butler*, 746 F.2d 431, 443-44 (8th Cir.1984).

In the instant case, both Talley and Kellar failed to object to the district court's statute of limitations charge. Indeed, they were not even represented at trial having, by their own stipulation, been excused from attending the lengthy proceedings. Thus, though their codefendants E & W and E.T. Barwick did object to the jury instruction, Talley and Kellar did not adopt these objections. Consequently, they have failed to preserve the issue for review on appeal unless the instruction was plainly erroneous.

Nor will it do for Talley and Kellar to argue that the district court's decision permitting them to be absent from trial somehow excuses them from their obligations pursuant to Rule 51. This would create the perverse result of according greater lenity to those who do not appear at trial than to those who do appear but merely neglect to adopt the objections of their codefendants.

Moreover, both Talley and Kellar were fully aware that the district court was reconsidering its earlier determination to charge a two-year statute of limitations. They were both served with voluminous memoranda on the subject submitted by the Osternecks and E & W, yet neither offered any reply of their own.[21] Thus, Talley and Kellar had ample opportunity to place their objections to the jury charge on the record as required by Rule 51. By failing to do so, they limited their own rights on appeal

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21. Moreover, had Talley and Kellar been present at trial they might have sought a special verdict from the jury assessing liability under a two-year statute of limitations. The record indicates that the district court would have been receptive to such a suggestion.

and may only receive a new trial if the jury instruction amounted to plain error.[22]

In the circumstances of this case, we cannot conclude that the trial court was plainly erroneous in charging the jury as it did. As the Supreme Court has recognized, a "court's interpretation of the contours of [an area of legal uncertainty] hardly could give rise to plain judicial error [when] those contours are . . . in a state of evolving definition and uncertainty." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256, 101 S.Ct. 2748, 2754, 69 L.Ed.2d 616 (1981); *see also Barnett*, 707 F.2d at 1581 n. 18; *Black v. Stephens*, 662 F.2d 181, 184 n. 1 (3d Cir.1981), *cert. denied*, 455 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1982).

The district court's jury instructions in this case were rendered at a time when the law concerning which statute of limitations to borrow from the forum state was uncer-

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22. Talley and Kellar can find no comfort in our decision in *Lang v. Texas & P. Ry. Co.*, 624 F.2d 1275 (5th Cir.1980). There we concluded that the failure to object to a jury charge "may be disregarded if the party's position has previously been made clear to the court and it is plain that a futher objection would be unavailing." *Id.* at 1279 (citation omitted). Appellants have satisfied neither prong of this requirement. Though their general position on the statute of limitations issue had been made clear to the court, neither Talley nor Kellar had addressed the immediate issue presented—the applicability of the then recently decided *Friedlander* district court opinion. Moreover, it could not have been plain that an objection would prove unavailing. The district court had previously chosen to apply a two-year statute of limitations and might easily have concluded that the *Friedlander* decision was distinguishable or that its earlier decision should not, for reasons of equity, be disturbed. Thus, the limited exception to Rule 51 contemplated in *Lang* is not applicable to this case.

tain. Applying a case-by-case analysis, the district court followed an earlier decision of the *Friedlander* district court, 595 F.Supp. at 1443-52, which chose a four-year statute of limitations in a similar securities case fraud case.

It was not until several months later that the Supreme Court, in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), revised the method by which courts should choose the appropriate statute of limitations to borrow and determined that lower courts must analyze the question on a statute-by-statute basis. Moreover, it was not until May 1986, over one year later, that this court first had occasion to apply the *Wilson* standard to a case involving the appropriate statute of limitations to be borrowed for federal securities claims. In *Friedlander*, 788 F.2d at 1507-09, we concluded that for all federal securities cases the appropriate statute of limitations to borrow is that of the Georgia Securities Act. Thus, though *Friedlander* now makes clear that the district court should properly have charged a two-year statute of limitations (since that is now and was in 1969 the statute of limitations in the Georgia Securities Act), we cannot say that the court's erroneous four-year charge was plain judicial error.[23] Given the uncertain and evolving contours of the law regarding the appropriate statute of limitations to borrow, we think the district court was

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23. It follows, a *fortiori*, that the error was not so fundamental as to result in a miscarriage of justice.

reasonable in its erroneous conclusion that a four-year statute of limitations should apply.[24] For these reasons,[25]

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24. Nor should the resolution we reach in this case be considered an inequitable one. Had a new trial been required because of an improper jury charge, it is likely, *see infra* note 31, that the only issue which such a new trial would resolve is the question of prejudgment interest. Though the damage judgment against Talley and Kellar was independently supported by the jury's finding that they were liable for common law fraud, prejudgment interest on the fraud judgment would not be available to the Osternecks because they failed to comply with Georgia's statutory notice and demand requirement for prejudgment interest on unliquidated damages. *See* O.C.G.A. § 51-12-14. It was only this oversight by the Osternecks' attorneys which makes the federal statute of limitations question relevant; had the proper notice been filed an award of prejudgment interest under Georgia law would have provided an independent ground for affirmance and permitted us to pretermit the statute of limitations question. Thus, in some sense, the "inequity" of holding Talley and Kellar to the stringent requirement of Rule 51 is balanced by the "inequity" inherent in the stringent requirement of O.C.G.A. § 51-12-14 whose operation is all that renders the statute of limitations question relevant in the first place.

25. An additional ground for decision suggests itself. In *Saint Francis College v. Al-Khazraji*, — U.S. —, 107 S.Ct. 2022, 2025-26, 95 L.Ed.2d 582 (1987), the Supreme Court concluded that changes in a statute of limitations made pursuant to the commands of *Wilson* should not be applied retroactively if the change would overrule clear circuit precedent upon which the complaining party was entitled to rely and if the retroactive application would be inconsistent with the purpose of the underlying substantive statute. *Cf. Goodman v. Lukens Steel Co.*, — U.S. —, — - —, 107 S.Ct. 2617, 2620-22, 96 L.Ed. 2d 572 (1987) (applying *Wilson* retroactively where circuit precedent was unclear. Plainly our decision in *Friedlander* revised prior clear circuit precedent. *See McNeal*, 598 F.2d at 892. However, the parties have not briefed the issues of justifiable reliance and consistency with the purposes of the underlying Securities Act. Thus, we decline to rest our decision upon the *St. Francis* analysis and content ourselves with merely noting that it tends to support our conclusion that no plain error has occurred.

Talley and Kellar's assertion that the erroneous jury charge entitles them to a new trial is without merit.[26]

Kellar also argues that the district court erred in instructing the jury that the statute of limitations was tolled until such time as the Osternecks knew or through due diligence should have known of the existence of their cause of action. This instruction, Kellar contends, improperly allowed the fraudulent concealment of third parties, such as Talley and Barwick Indsutries, to be attributed to him. Instead, Kellar argues, the four-year statute of limitations should not be tolled against him because he did not do any fraudulent acts which would have concealed the Osternecks' cause of action. Were we to accept Kellar's argument the statute of limitations would have expired four years after the merger and the Osternecks' suit against Keilar would be barred.

Kellar, however, is mistaken.[27] Though the limitations period for a securities claim is borrowed from the forum state "the date when a claim accrues so as to trigger the state law limitation period is matter of federal law." *Sargent v. Genesco, Inc.*, 492 F.2d 750, 758 (5th Cir.1974). Under federal law the statute of limitations for a fraud action may be equitably tolled. *See Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946) (tolling limitations period in action under Federal

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26. Our resolution of the issue in this matter makes it, of course, unnecessary to consider the Osternecks' argument that any error in charging a four-year limitation period was harmless.

27. Consistent with our conclusion above, we review this instruction under the plainly erroneous standard. We conclude, however, that the district court instruction was a correct statement of the law and would have been sustained under any standard of review.

Farm Loan Act). This equitable tolling doctrine is plainly available to federal securities law plaintiffs. *Schaefer v. First National Bank,* 509 F.2d 1287, 1295-96 (7th Cir. 1975), *cert. denied,* 425 U.S. 943, 96 S.Ct. 1682, 48 L.Ed.2d 186 (1976). Equity mandates that the statute of limitations be tolled until the fraud is discovered, *Sargent,* 492 F.2d at 758, provided that the plaintiff injured by fraud "remains in ignorance of it without any fault or want of diligence or care on his part," *Parrent v. Midwest Rug Mills, Inc.,* 455 F.2d 123, 128 (7th Cir.1972) (quoting *Bailey v. Glover,* 88 U.S. (21 Wall.) 342, 348, 22 L.Ed. 636 (1875)). Since the jury instructions plainly charged the jury with this exact standard, Kellar's contention that the district court erred is without merit.[28]

B. *Other Federal Issues*

Several other issues pertaining to the federal securities judgment have been raised by the parties. First, appellant Kellar contends that there was insufficient evi

28. Kellar attempts to distinguish this line of cases, arguing that none involve situations where the existence of the cause of action was concealed by third parties and not by the defendant who seeks to take advantage of the statute of limitations. However, a well-established line of cases articulates an equitable tolling doctrine that does not depend upon affirmative concealment after the initial fraud. Where, as in this case, concealment is inherent in the nature of the wrong done, *cf. Hobson v. Wilson,* 737 F.2d 1, 33-36 (D.C. Cir 1984) (characterizing such acts as self-concealing fraud), *cert. denied,* 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985), all that is necessary to toll the statute is a plaintiff's due diligence in seeking to discover the fraud, *id.* at 34 n. 103 (collecting cases applying this rule). *See also, Trecker v. Scag,* 679 F.2d 703, 708 (7th Cir.1982). Since only a demonstration of due diligence is necessary and since the Osternecks have made such a demonstration to the jury's satisfaction, the requirements for tolling the statute of limitations against Kellar have been satisfied.

dence to support the judgment against him. After carefully reviewing the record, we conclude that there was sufficient credible evidence of Kellar's direct liability to allow a jury to enter judgment against him,[29] and that this issue warrants no further discussion.

Appellant Talley raises two additional issues on appeal: (1) whether the district court improperly shifted to him the burden of rebutting the Osternecks' bill of costs; and (2) whether the district court erred in permitting his codefendants to cross-examine him at trial. We have closely examined these questions and find that the assignment of error are without merit and warrant no discussion.

The final federal issue posed is the Osternecks' contention that the district court abused its discretion in awarding prejudgment interest only in the amount of $945,512.85.[30] In making this award, the district court exercised two forms of discretion. First, the court chose to award prejudgment interest at the rate of 7% annually, not compounded. This required a total

29. Kellar also contends that there was insufficient evidence to support a judgment of liability against him on the theories that he aided and abetted Barwick Industries' securities fraud or that he was a controlling person in Barwick Industries within the meaning of the securities law. Because we conclude there was sufficient evidence to support a finding of direct liability, we need not consider these issues.

30. Talley and Kellar do not challenge the amount of the award. Their sole contention in this regard is that the award of prejudgment interest must be vacated because the judgment against them on the federal securities claims was based upon an improper jury instruction with respect to the statute of limitations. We have, however, rejected their contention that the federal judgment was improper. Hence, Talley and Kellar's challenge to the award of prejudgment interest must also be rejected.

interest award of over 2.8 million dollars. Though this interest award exceeded the principal judgment of $2,632,-234, it was nonetheless, the smallest interest award the trial court could have rendered. Other methods of calculation, for example compounding the principal in three-month certificates of deposit for the entire period of this litigation, would have produced interest awards of over 7 million dollars.

In its second exercise of discretion, the district court then determined that its initial interest award of some 2.8 million dollars should be reduced by two-thirds. This reduction reflected the district court's conclusion that: (1) an interest award in excess of the principal sum would be punitive; and (2) that a substantial portion of the delay in bringing this suit to a conclusion could be attributed either to actions the plaintiffs had taken or to delays inherent in the federal judicial system. Thus, the district court concluded that the defendants, having been responsible for no more than one-third of the delay in bringing this suit to trial, were responsible for only one-third of the prejudgment interest which might be awarded. Consequently, the district court awarded prejudgment interest on the federal securities claim in the amount of $945,512.85. The Osternecks challenge only this second exercise of discretion.

It is clear that whether "prejudgment interest should be awarded on a damage recovery in a [federal securities] action is a question of fairness resting within the District Court's sound discretion." *Wolf v. Frank*, 477 F.2d 467, 479 (5th Cir.), *cert. denied*, 414 U.S. 975, 94 S.Ct. 287, 38 L.Ed.2d 218 (1973). Moreover, in awarding prejudgment interest, the district court must insure that the award is

not punitive in nature. *Norte & Co. v. Huffines*, 416 F.2d 1189, 1191-92 (2d Cir.1969), *cert. denied*, 397 U.S. 989, 90 S.Ct. 1121, 25 L.Ed.2d 396 (1970). Finally, because the award of prejudgment interest is compensatory rather than punitive, the award must be "tempered by an assessment of the equities." *Id.* at 1191. It is apparent to us that the factors relied upon by the district court are precisely the sorts of equitable considerations which should be evaluated in making a prejudgment interest award. Therefore, we cannot conclude that the district court abused its discretion in awarding the Osternecks only $945,512.85 in prejudgment interest.

For the reasons stated in the foregoing analysis, the federal securities judgment in the amount of $2,632,234 entered in favor of the plaintiffs and against Barwick Industries, Kellar and Talley with prejudgment interest in the amount of $945,512.85 is, in all respects, affirmed.[31]

III. CONCLUSION

In sum, the appeals in Case Nos. 85-8165 and 85-8523 are DISMISSED for want of appellate jurisdiction. The judgment in Case No. 85-8593 is AFFIRMED.

AFFIRMED in part, and appeals DISMISSED in part.

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31. The federal securities judgment which we affirm includes prejudgment interest. Thus, the total award received by the Osternecks on their federal claim exceeds the amount they were awarded based upon their state common law fraud judgment. Consequently, because a second recovery on the state law claims would not be possible, we need not address any issues presented by the challenge to the state law judgment and we expressly decline to decide them. However, *see supra* note 24.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-8165

MYLES OSTERNECK, et al.,
Plaintiffs-Appellants,
Cross-Appellees,

versus

E.T. BARWICK INDUSTRIES,
Defendant,

E.T. BARWICK,
Defendant,

M.E. KELLAR,
Defendant-Appellant,
Cross-Appellee,

BUFORD TALLEY,
Defendant-Appellant,
Cross-Appellee,

ERNST & WHINNEY,
Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion August 31, 11 Cir., 1987, — F.2d —)
(Filed October 19, 1987)

Before HATCHETT and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:
/s/ R. L. Anderson
United States Circuit Judge

ORD-42

No. 87-1201

In The
Supreme Court of the United States
October Term, 1988

MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,

Petitioners.

v.

ERNST & WHINNEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Did the Petitioners' request for discretionary prejudgment interest constitute a motion under Rule 59(e) of the Federal Rules of Civil Procedure which rendered their notice of appeal untimely pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure?

2. If the Petitioners' request for prejudgment interest is to be considered a Rule 59(e) motion, did the Eleventh Circuit err in refusing to hear the appeal under the "unique circumstances" doctrine?

PARTIES

The following persons and entities were parties to the proceeding in the Court of Appeals: Myles Osterneck, Guy-Kenneth Osterneck, Myles and Guy-Kenneth Osterneck as Trustees for the Benefit of Robert Osterneck (Plaintiffs-Appellants); E.T. Barwick Industries, Inc., M.E. Keller, B.A. Talley (Defendants-Cross Appellants); Eugene Barwick, Ernst & Whinney (Defendants-Appellees).

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OPINIONS BELOW

The Court of Appeals' opinion sought to be reviewed is reported at 825 F.2d 1521 and appears in the Joint Appendix at J.A. 49. Additional orders of the Court of Appeals and District Court, which are not reported also appear in the Joint Appendix as follows: the Judgment entered on the merits in the District Court (J.A. 6), the District Court's order determining that prejudgment interest is a separate issue and directing entry of judgment as soon as possible (J.A. 4), the District Court's order granting prejudgment interest (J.A. 39) and the judgment adding prejudgment interest (J.A. 44).

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JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1). The judgment of the Court of Appeals of the Eleventh Circuit was entered on August 31, 1987. The Eleventh Circuit denied Petitioners' Suggestion of Rehearing In Banc and Petition for Rehearing on October 19, 1987. The petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit was filed in this Court on January 15, 1988. This Court granted the Writ of Certiorari in this case on June 6, 1988.

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FEDERAL STATUTES AND RULES INVOLVED

28 U.S.C. § 1291:

Final Decisions of District Court.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal

Zone, the District Court of Guam and the District Court of the Virgin Islands, except where a direct view may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in § 1292(c) and (d) and § 1295 of this title.

Rule 54 of the Federal Rules of Civil Procedure:

Judgment; Costs

(a) *Definition; Form.*

"Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) *Judgment Upon Multiple Claims or Involving Multiple Parties.*

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct entry as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon express direction for the entry of judgment. . . .

Rule 58 of the Federal Rules of Civil Procedure:

Entry of Judgment.

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the

judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Rule 59(e) of the Federal Rules of Civil Procedure:

Motion to Alter or Amend a Judgment.

A motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment.

Rule 4(a) of the Federal Rules of Appellate Procedure:

(a) *Appeals in Civil Cases.*

1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within sixty days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

. . .

3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

. . .

6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

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STATEMENT OF THE CASE

This case arises out of the 1969 merger of Cavalier Bag Co. with E.T. Barwick Industries, Inc. ("Barwick Industries"). Petitioners Myles Osterneck, et al. ("the Osternecks"), who owned Cavalier Bag Co. until that time, exchanged their stock in Cavalier for Barwick Industries stock. (R1-1). Sometime later the Osternecks became aware that the audited financial statements of Barwick Industries for the fiscal years 1968 through 1975 vastly overstated the financial condition of Barwick Industries. The Osternecks had relied on these financial statements and other representations in deciding to approve the merger and in deciding to purchase and retain additional stock in Barwick Industries after the merger. (R34-1244-45, R39-2073-75, R43-3125, R45-3129 R50-4006).

On September 4, 1975 the Osternecks filed this action alleging violations of §§ 10(b) and 20 of the Securities Act of 1934 (15 U.S.C. §§ 78j(b), 78t), Rule 10(b)(5) thereunder (17 C.F.R. § 240.10b-5) and the common law of Georgia. (R1-1) In addition to Barwick Industries and several other individuals and organizations, the accounting firm of Ernst & Whinney ("E & W") was named as a defendant. E & W had not only prepared the inflated financial statements, but also had actively participated in the merger and had received a substantial fee from the Osternecks pursuant to the merger agreement. (R37-1656-59, R-39-2070, R50-4011). The Osternecks alleged that E & W was liable for negligence as well as common law fraud and securities fraud.

Although the Osternecks' negligence claims against E & W were dismissed, apparently on the ground that no privity existed between E & W and the Osternecks, the Osternecks' remaining claims were tried before a jury almost ten years after the complaint was filed. Trial of the case lasted three and one-half months. At the close of evidence the trial court ruled that the Osternecks' claim against E & W did not include common law fraud. (R77-8047). Subsequently, the jury returned a verdict which determined liability as to all parties and awarded damages against Barwick Industries and two individual defendants on the Osternecks' securities and common law fraud claims. (J.A. 1). The jury, however, found that E & W was not liable under the securities laws. (J.A. 1).

Immediately after the jury verdict was announced, the Osternecks orally moved that prejudgment interest be included in the judgment. (J.A. 5). The District Court held, however, that the question of prejudgment interest must be handled "separately" from the judgment on the

merits and deferred ruling on the issue. (J.A. 4-5). In the same ruling, the District Court expressly determined that judgment should be entered "as soon as possible" and directed the clerk to enter judgment accordingly. (J.A. 5).

> The Court: There's another matter that has to be brought to the Court on this issue, that is, prejudgment interest on this particular verdict, but I am going to have to handle that separately and have it argued to me.
>
> . . .
>
> The Court: All right. I will hear the motion concerning prejudgment interest. I know it's going to be offered from the plaintiffs. Just state on the record that you are going to move for prejudgment interest.
>
> Mr. Webb: Yes, Your Honor, we are. We do move for prejudgment interest in favor of the plaintiffs against the defendants against whom the verdicts were returned.
>
> The Court: In view of the fact that I do not wish to have it argued right now and based on the request of the lawyers, I will allow it to be submitted in writing.
>
> The plaintiffs will have ten days to present to the judge the plaintiffs' position on prejudgment interest and the affected defendants will have ten days thereafter, after they receive a copy of the brief and submission of the plaintiffs' to respond and then the judge will rule on it.
>
> The judge will direct the clerk to issue a judgment on the verdict and I don't think—I think it can be done without having to have the lawyers submit proposed judgments. Sometimes you have to do that, but I think it can be figured out, Ms. Daniels. If you need any assistance you can talk to the judge.
>
> The judgment will be entered on this particular verdict as soon as possible, then if prejudgment interest is granted it will be—the judgment can be amended.

(J.A. 4-5).

In accordance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure, judgment was entered on the jury verdict later the same day, January 30, 1985. (J.A. 6-7).

Pursuant to the trial judge's instructions, the Osternecks filed in writing their request for prejudgment interest several days later. (J.A. 8-9). In addition, believing that the District Court erred in dismissing their negligence and fraud claims against E & W and in its rulings on certain evidentary questions and jury charges, the Osternecks filed a notice of appeal on March 1, 1985. (J.A. 34). In fact, all parties filed notices of appeal from the January 30 judgment in March 1985. (J.A. 2, R23-475-477, 482-484).

In July 1985, the District Court awarded the Osternecks prejudgment interest and entered an "Amended Judgment" directing that prejudgment interest be "added" to the earlier "final judgment". (J.A. 39, 44-45). Although styled "Amended Judgment," the July 1985 judgment did not change any rights which had been established by the January 30, 1985 judgment. (J.A. 44-45). To the contrary, the July 1985 judgment expressly provided that the January judgment would "remain the same" in every respect other than the addition of prejudgment interest to the amount awarded by the jury on the merits of the federal securities claim. (J.A. 45).

Almost two months after the July 1985 order, the clerk of the Eleventh Circuit raised a question as to whether the Osternecks' motion for prejudgment interest should be considered a motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure which would render the Osternecks' March 1, 1985 notice of appeal invalid. (11th Cir. Rec. Letter of clerk dated

9/5/85).[1] Prior to this time, no one involved in this case had ever considered the Osternecks' motion for prejudgment interest to be a Rule 59(e) motion which would invalidate all prior notices of appeal.

For example, in April, 1985 the Eleventh Circuit raised an unrelated jurisdictional question regarding the timeliness of the Osternecks' March 28, 1985 notice of cross appeal against Barwick Industries, which was filed 14 days after Barwick Industries' first notice of appeal. (11th Cir. Rec., letter of clerk dated 4/8/85). Although the Eleventh Circuit questioned the timeliness of the notice of cross appeal under F.R.A.P. 4(a)(3) because the notice was not filed within fourteen days of the first notice filed by any party in the case, it did not not question whether the pending motion for prejudgment interest was a Rule 59(e) motion which would affect the timeliness of any of the notices of appeal under F.R.A.P. 4(a)(4). *Id.* In a brief filed with the Eleventh Circuit in April 1985 on this issue, E & W stated that the Osternecks' March 1 notice of appeal was the first "timely filed" notice of appeal from a "final judgment." (11th Cir. Rec., E & W brief filed on 4/22/85, at 3, 7). In addition, two of the parties to the appeal filed a stipulation in the Eleventh Circuit that the Osternecks' March 15, 1985 notice of cross appeal was timely. (J.A. 37).

Moreover, the District Court required the Osternecks to pay an additional filing fee for their notice of

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[1] The clerk of the Eleventh Circuit has certified for inclusion in the record several items which were filed in the Eleventh Circuit and which are relevant to this review. Those items are cited by reference to the Eleventh Circuit Record ("11th Cir. Rec.") with a brief description of the item following.

cross appeal filed after the District Court's award of prejudgment interest. (J.A. 59). Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that such an additional filing fee is not required when a new notice of appeal is filed after an order entered on a Rule 59(e) motion. E & W filed its notice of appeal from the award of costs on the January 30 judgment in June 1985 and failed to renew the notice after the order awarding pre-judgment interest as would have been required if the Osternecks' motion for prejudgment interest were a Rule 59(e) motion. (R23-504). The District Judge treated the January 30, 1985 judgment as the *final* judgment notwithstanding the pending motion for prejudgment interest when in May 1985 he denied as untimely E.T. Barwick's motion for an extension of time to file a bill of costs. (J.A. 35). Indeed, even in granting the motion for prejudgment interest, the District Judge continued to refer to the January 30, 1985 judgment as the "final" judgment. (J.A. 44).

The Osternecks filed a brief in the Eleventh Circuit on September 19, 1985 on the jurisdictional question regarding the March 1, 1985 appeal. In an order dated October 30, 1985, the Eleventh Circuit held that "the jurisdictional issues are carried with the case." (J.A. 48). On August 31, 1987 the Court of Appeals held that a post-judgment motion for discretionary prejudgment interest is a Rule 59(e) motion and dismissed the Osternecks' appeal as untimely pursuant to Rule 4(a)(4) of the Federal Rules of Appellate Procedure. (J.A. 49). Prior to its August 31, 1987 decision, the Eleventh Circuit had never before held that a motion for prejudgment interest constituted a Rule 59(e) motion.

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SUMMARY OF ARGUMENT

This case raises the jurisdictional question of whether a post-judgment motion for prejudgment interest suspends the finality of the judgment for purposes of appeal. Established precedent demonstrates that such a motion should not affect the finality of the judgment.

The rules of judicial procedure which govern this jurisdictional question are found in § 1291 of the Judicial Code (28 U.S.C. § 1291), Rule 4(a) of the Federal Rules of Appellate Procedure ("F.R.A.P."), and Rule 59(e) of the Federal Rules of Civil Procedure ("F.R.Civ.P."). Section 1291 provides that the "Court of Appeals . . . shall have jurisdiction of appeals from all final decisions of the District Courts of the United States . . . ." F.R.A.P. 4(a)(1) provides that a notice of appeal shall be filed in the District Court within thirty days after entry of the judgment or order appealed from. Rule 4(a)(4), however, modifies Rule 4(a)(1) by providing that if a timely motion to alter or amend judgment is filed in the District Court by any party under F.R.Civ.P. 59(e), the time of appeal for all parties runs from the entry of the order granting or denying such a motion. Rule 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment."

Traditionally, this Court has taken a practical approach in determining whether a judgment is final and appealable under the federal rules. Under this approach, a judgment which effectively terminates the litigation is final and appealable if the rights which it adjudicates are not subject to change by subsequent proceedings in the district court. The reservation of issues for determination after entry of a judgment on a jury verdict on the

merits, therefore, has no effect on the finality and appealability of the judgment if resolution of the issues could not moot or revise what has already been adjudicated. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 308-09 (1962); *Dickinson Petroleum Conversion Corp.*, 338 U.S. 507, 513-16 (1950). Likewise, a post-judgment motion which does not seek to change what has already been established by the judgment does not affect the finality or appealability of the judgment. *FTC v. Minneapolis-Honeywell Reg. Co.*, 344 U.S. 206, 211-213 (1952); *Dept. of Banking v. Pink*, 317 U.S. 264, 266 (1942).

The Supreme Court has made it clear that the finality of such a judgment remains intact regardless of whether the subsequent proceedings involve "merits" because the judgment is "independent of and unaffected by" the subsequent proceedings. *Budinich v. Becton Dickinson And Co.*, — U.S. —, 108 S.Ct. 1717, 1721 (1988); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 126 (1945). Conversely, the Supreme Court has made it clear that if a post-judgment motion does seek to change what has already been decided, or if a subsequent judgment alters previously adjudicated rights, then the time for appeal runs from the disposition of the motion or from the subsequent judgment. *Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203, 205 (1943).

This traditional approach to the finality and appealability of judgments is compatible with and a natural consequence of the provision in F.R.A.P. 4(a)(4) which suspends the finality of a judgment upon the filing of a Rule 59(e) motion. Legislative history and case law demonstrate that a Rule 59(e) motion, by definition, requests a change in what has already been decided. *White*

v. New Hampshire Dept. of Emp. Sec., 455 U.S. 445 (1982); *Boaz v. Mutual Life Ins. Co. of New York*, 146 F.2d 321 (8th Cir. 1945). Thus, a Rule 59(e) motion would suspend the finality of a judgment until disposal of the motion under the traditional approach as well as under Rule 4(a)(4). On the other hand, because a post-judgment motion which does not seek to change what has already been decided is not a Rule 59(e) motion, it does not suspend the finality of the judgment under F.R.A.P. 4(a)(4) or under the traditional analysis. *See Budinich, supra*, 108 S.Ct. at 1720-21; *Buchanan v. Stanships, Inc.*, — U.S. —, 108 S.Ct. 1130 (1988). In effect, F.R.A.P. 4(a)(4) and Rule 59(e) by operation embrace the traditional approach to finality of judgments for purposes of appeal. *FCC v. League of Women Voters of California*, 468 U.S. 364, 373-74, n. 10 (1984).

The above principles and rules of appellate procedure require that the Eleventh Circuit's dismissal of the Osternecks' March 1, 1985 appeal be reversed. The Osternecks filed their March 1, 1985 notice of appeal within 30 days of the January 30, 1985 judgment in accordance with F.R.A.P. 4(a)(1). The January 30 judgment which was entered on the jury verdict on the merits was final under 28 U.S.C. § 1291 for purposes of appeal because it effectively terminated the litigation as to all parties. The trial court's reservation of the question of prejudgment interest for subsequent determination did not suspend the finality of the judgment because resolution of the prejudgment interest question could not moot or revise the rights which were established by the January 30 judgment. The rights adjudicated in the January 30 judgment remained at all times "independent of, and unaffected by" the resolution of the prejudgment interest issue. *See Budinich, supra*, 108 S.Ct. at 1721. Indeed, the "amended judgment" expressly provided that the provisions of the January 30 judgment would remain intact. (J.A. 45).

Likewise, the Osternecks' motion for prejudgment interest did not suspend the finality of the January 30 judgment because the motion did not seek to change or correct anything that had already been decided. To the contrary, the motion merely sought resolution of a collateral, independent issue which had intentionally not yet been considered or decided by the court. Because the motion did not seek to change anything in the judgment, it cannot be construed as a Rule 59(e) motion which would toll the time for filing the notice of appeal under F.R.A.P. 4(e)(4). *Jenkins v. Whittaker Corp.*, 785 F.2d 720 (9th Cir. 1986), cert. den. — U.S. —, 107 S.Ct. 324 (1986). Furthermore, as *Budinich, supra*, makes clear, the prejudgment interest question did not disturb the judgment's finality regardless of whether prejudgment interest is related to the "merits" of the action.

Accordingly, because the time for filing the notice of appeal was not suspended by the motion for prejudgment interest, the Eleventh Circuit erred in dismissing the Osternecks' March 1, 1985 appeal.

Finally, even if the Osternecks' motion for prejudgment interest is now construed as a Rule 59(e) motion, the Eleventh Circuit erred in dismissing the Osternecks' appeal in light of the "unique circumstances" doctrine. Under the "unique circumstances" doctrine, an appeal should not be dismissed as untimely where the appellant

relied on statements or actions of the district court in determining when to file a notice of appeal. *E.g. Thompson v. Immigration and Naturalization Serv.*, 375 U.S. 384 (1964). Because the Osternecks relied on the statements and actions of the District Court in determining when to file their notice of appeal, the Eleventh Circuit erred in dismissing the Osternecks' appeal as untimely.

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ARGUMENT AND CITATION OF AUTHORITIES

I. The Well-Established Principles And Rules Of Federal Procedure Require That The Eleventh Circuit's Dismissal Of The Osternecks' March 1, 1985 Appeal Be Reversed.

A. Under Traditional Principles of Appellate Procedure, A Judgment Which Effectively Terminates The Litigation Is Final And Appealable If The Rights Which It Adjudicates Are Not Subject To Change By Subsequent Proceedings In The District Court.

This Court has repeatedly stated that a judgment is final for purposes of appeal when it terminates the litigation on the merits and "leaves nothing to be done but to enforce by execution what has been determined." *E.g. Catlin v. United States*, 324 U.S. 229, 233 (1945); *Berman v. United States*, 302 U.S. 211, 213 (1937). This Court has made it clear, however, that the concept of finality under 28 U.S.C. § 1291 does not require a judgment completely disposing of every matter or issue that arises in the litigation. *E.g. Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985); *Gillespie v. United States Steel Corp.*, 379 U.S.

148, 152 (1964). Rather, the § 1291 requirement of finality "is to be given a 'practical rather than a technical construction.'" *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974). An order during the course of a case, therefore, may be sufficiently independent to be deemed a final decision under § 1291 under the "collateral order" doctrine described in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-46 (1949). Likewise, a judgment may be final for purposes of appeal under F.R.Civ.P. 54(b) notwithstanding the pendency of additional claims where such additional claims are separable from and could have no effect on what had already been decided in the judgment. F.R.Civ.P. 54(b); *In re Flight Trans. Corp. Sec.*, 825 F.2d 1249, 1251 (8th Cir. 1987); *Exchange Nat. Bank of Chicago v. Daniels*, 763 F.2d 286, 291 (7th Cir. 1985).

Adhering to the traditional, practical principles of finality which are embraced by the *Cohen* doctrine and Rule 54(b), this Court has determined that a question remaining to be decided after an order effectively terminating litigation on the merits does not prevent finality if its resolution could not change the legal rights which have been plainly and properly set forth in the initial judgment. *Brown Shoe Co. v. United States*, 370 U.S. 294, 308 (1962); *FTC v. Minneapolis-Honeywell Reg. Co.*, 344 U.S. 206, 211-213 (1952); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 515-16 (1950); *Dept. of Banking v. Pink*, 317 U.S. 264, 266 (1942); *Berman, supra*, 302 U.S. at 213. *See also Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 126 (1945) (Review of a prior judgment was allowed because it "is independent of and unaffected by" the subsequent proceeding).

> Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower Court *changes* matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. *The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, have been plainly and properly settled with finality.*

Minneapolis-Honeywell, supra, at 211-212 (emphasis added).

Accordingly, in *Minneapolis-Honeywell, supra,* this Court refused to construe a post-judgment filing as a motion to amend the judgment which would suspend the time for appeal because the filing did not seek to change what had been established by the judgment. In that case, several antitrust issues were raised on appeal. When it became apparent that the parties were in agreement as to the lower court's resolution of the first two of the three issues, the parties abandoned argument on those issues. Subsequently, the court of appeals entered judgment relating only to the third issue. Long after the entry of judgment and the time for filing a petition for rehearing, the Federal Trade Commission filed a memorandum which asked the court of appeals to specifically affirm the lower court's resolution of the first two issues. The court of appeals granted the request and entered a "final decree" in which it incorporated the prior decree and added to it an affirmance of the first two claims. The Commission then filed a petition for certiorari to this Court challenging the court of appeals' determination of the third issue. The

petition would not have been timely filed if the first judgment was the final judgment for purposes of appeal. *Minneapolis-Honeywell,* at 208-10.

Because the memorandum filed by the Commission sought no alteration of what had been established by the first judgment but merely sought additional provisions, the Court refused to construe the memorandum as a motion to amend the previous judgment which would suspend the time for appeal.

> Moreover, the memorandum was labeled neither as a petition for rehearing nor as a motion to amend the previous judgment, and in no manner did it purport to seek such relief. On the contrary, the Commission indicated that it was quite content to let the Court of Appeals' decision of July 5 stand undisturbed. Since we cannot treat the memorandum of August 21 as petitioner would have us treat it, we cannot hold that the time for filing a petition for certiorari was enlarged simply because this paper may have prompted the court below to take some further action which had no effect on the merits of the decision that we are now asked to review in the petition for certiorari.

Minneapolis-Honeywell, supra, at 210-211. The Court went on to hold that even though the second judgment was labeled the "final decree," it did not affect the finality of the first judgment for purposes of appeal because it "reiterated without change" everything which had been decided by the first judgment. *Id.* at 212.

This Court has refused to construe post-judgment filings in a manner which would suspend the time for appeal in other cases as well where the post-judgment filing did not seek to change any rights which had been established by the judgment. For example, in *Berman, supra,*

the court determined that suspension of a sentence in a criminal case did not affect the finality of the judgment because "[i]t does not secure reconsideration of issues that have been determined or change the judgment that has been rendered." *Berman, supra,* 302 U.S. at 213. Similarly, this Court has refused to construe a post-judgment motion to amend a remittitur to add the statement that a federal question was presented as a motion to amend the judgment which would affect the finality and appealability of the judgment because the "motion did not seek a reargument or rehearing on any part of the case," or to "reconsider any question decided in the case." *Dept. of Banking v. Pink, supra,* 317 U.S. at 266.

Under traditional principles of finality, therefore, a post-judgment motion which does not seek to change what has been established by the judgment does not suspend the finality of the judgment or the time for filing an appeal. *Cf. Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203, 205 (1942) (Where motion asked that rights which were already adjudicated be altered, it deprived the judgment of the finality which is essential to appealability).

B. Rule 4(a)(4) Of The Federal Rules Of Appellate Procedure And Rule 59(e) Of The Federal Rules Of Civil Procedure Embrace The Traditional Approach To Finality Of Judgments For Purposes Of Appeal.

The traditional approach to determination of the finality and appealability of judgments is compatible with and a natural consequence of the provision in F.R.A.P. 4(a)(4) which suspends the finality of a judgment upon the filing of a Rule 59(e) motion. Legislative history and case law demonstrate that a post-judgment motion which

does not seek to change what has already been established by the judgment is not a Rule 59(e) motion and, therefore, does not suspend the finality of the judgment under F.R.A.P. 4(a)(4).

Subdivision (e) was added to Rule 59 in 1946. This subdivision simply provides that "a motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment." The Notes of the Advisory Committee explain that subdivision (e) was "added to care for a situation such as that arising in *Boaz v. Mutual Life Ins. Co. of New York,* C.C.A. 8, 1944, 146 F.2d 321, and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry." Notes of Advisory Committee on 1946 Amendment to Rules, 5 F.R.D. 433, 476 (1946). Thus, a Rule 59(e) motion is the same kind of motion which was encountered in *Boaz. See Boaz,* 146 F.2d at 322.

The motion in *Boaz* was a motion to reconsider *and change* rights which had already been adjudicated and not a motion for determination of supplemental relief. Indeed, *Boaz* repeatedly describes the issue as whether the trial judge had inherent power "to correct errors in proceedings [,] . . . to reconsider and correct the actions taken at the close of plaintiff's evidence." *Id.* Accordingly, the Tenth Circuit has described motions to alter or amend the judgment as "those which call into question the correctness of a judgment on some material point of fact or law, and may properly be cast in the form of a motion to reconsider, to vacate, to set aside, for reargument, or for rehearing." *St. Paul Fire & Marine Insurance Co. v. Continental Cas. Co.*, 684 F.2d 691, 693 (10th Cir. 1982). In discussing the scope of Rule 59(e), the Seventh Circuit

has pointed out that "[t]he sort of alteration that restarts all periods of time is one that 'changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered.'" *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986) (quoting *Minneapolis-Honeywell, supra*). Professor Moore has described Rule 59 as "an amalgamation of a motion for new trial at common law and the petition for rehearing in equity." 6A J. Moore, *Moore's Federal Practice*, par. 59.02 (2d ed. 1987).

Plainly stated, the *Boaz* type motion which is now authorized by Rule 59(e) is merely a motion to correct errors in a decision which has already been rendered. Because the purpose of Rule 59(e) is to allow the District Court to "correct its own errors," such a motion must necessarily seek to *change* something that had already been decided.

Indeed, this Court has consistently limited the scope of Rule 59(e) to motions which actually seek an alteration of the rights adjudicated in the first judgment. In *White v. New Hampshire Dept. of Emp. Sec.*, 455 U.S. 445 (1982), this Court granted certiorari to resolve the conflict regarding the scope of Rule 59(e) in a case involving a motion for attorney's fees under 42 U.S.C. § 1988. Finding that Rule 59(e) is invoked "only to support reconsideration of matters encompassed in a decision on the merits," not to the initial granting of relief which is "collateral to the main cause of action," the Court held that a motion for attorney's fees pursuant to § 1988 does not constitute a Rule 59(e) motion. *White, supra* at 450-52. Significantly, in *White*, the Supreme Court did not limit its inquiry to the history or nature of motions for attorney's

fees. Rather, the Court dealt with the question by reviewing the purpose and scope of Rule 59(e) in general.

> Rule 59(e) was added to the Federal Rules of Civil Procedure in 1946. Its draftsmen had a clear and narrow aim. According to the accompanying Advisory Committee Report, the rule was adopted to "mak[e] clear that the district court possesses the power" to rectify its own mistakes in the period immediately following the entry of judgment. The question of the court's authority to do so had arisen in *Boaz v. Mutual Life Insurance Company of New York*, 146 F.2d 321, 322 (CA8 1944). According to their report, the draftsmen intended Rule 59(e) specifically "to care for a situation such as that arising in *Boaz*."
>
> Consistently with this original understanding, the federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits. [cit.] By contrast, a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action—issues to which Rule 59(e) was never intended to apply.
>
> . . .
>
> "[A] motion for attorney's fees is unlike a motion to alter or amend a judgment. *It does not imply a change in the judgment, but merely seeks what is due because of the judgment.* It is, therefore, not governed by the provisions of Rule 59(e)."

Id. (emphasis added). Thus, *White* made it clear that Rule 59(e) was meant only to apply to motions which sought to "reconsider" and "change" the rights adjudicated in the judgment. *Id.* at 452.

In *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), this Court combined the reasoning of *White* with traditional principles of finality to hold that

a post-judgment motion which did not actually seek an alteration of the rights adjudicated in the first judgment would not suspend the finality of the judgment for purposes of appeal. Although F.R.A.P. 4(a)(4) and Rule 59(e) did not control the outcome in *League of Women Voters* because the case involved a direct appeal from the District Court, the Court observed that the operation of F.R.A.P. 4(a)(4) and Rule 59(e) was analogous to the traditional rule of finality. *Id.*, at 373, n.10. Under both, "the filing of a petition for rehearing or a motion to amend or alter the judgment 'suspend[s] the finality of the [original] judgment; thereby extending the time for filing a notice of appeal 'until [the lower court's] denial of a motion . . . restores' that finality." *Id.*

League of Women Voters emphasized, however, "*that the rule requiring suspension of a judgment's finality for purposes of appeal during the pendency of a post-judgment motion for reconsideration applies only when such a motion actually seeks an 'alteration of the rights adjudicated' in the court's first judgment.*" 468 U.S. at 373, n.10 (emphasis added). Moreover, after noting that the post-judgment issue had never been briefed prior to entry of the initial judgment, the Court looked to its prior analysis of the scope of Rule 59(e) in *White* to support its conclusion that the motion did not constitute a motion to amend which would suspend the finality of the judgment because it did not seek to change the rights which were established by the judgment. *Id.*

This Court again combined the reasoning of *White* with principles of finality and appealability in two recent cases. In *Buchanan v. Stanships, Inc.*, — U.S. —, 108 S.Ct. 1130 (1988), the Court reversed the Fifth Circuit's decision that a post-judgment motion for costs could be a Rule 59(e) motion. In explaining its decision, the Court again emphasized that a motion which does not seek to "change" what has been established by the judgment cannot be a Rule 59(e) motion:

> [T]he federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits." *White supra,* 455 U.S. at 451, 71 L.Ed.2d 325, 102 S.Ct. 1162. In *White* we held that a motion for attorney's fees under 42 U.S.C. § 1988 was not a Rule 59(e) motion. We reasoned that because § 1988 provides for fees independently of the underlying cause of action and only for a "prevailing party," a motion for fees required an inquiry "separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed.'" [cit.] Such a motion therefore " 'does not imply a change in the judgment but merely seeks what is due *because of* the judgment.' "

Buchanan, supra, at 1131 (emphasis original). Moreover, the Court cited *League of Women Voters, supra* and *Eisen, supra,* both of which are based on general principles of finality, as authority for its conclusion that F.R.A.P. 4(a)(4) and Rule 59(e) were not intended to apply to a post-judgment request which "raises issues wholly collateral to the judgment in the main cause of action." *Id.* at 1132.

In *Budinich v. Becton-Dickinson and Company,* 108 S.Ct. 1717 (1988), the Court also addressed the *White* analysis and general principles of finality and appealability in an opinion which held that a post-judgment proceeding did not suspend the finality of an order effectively

terminating the litigation where resolution of the proceeding could not change any of the decisions embodied in the order. *Budinich* presented the question of whether a decision on the merits is final under § 1291 when the recoverability or amount of attorney's fees remains to be determined. In holding that the decision should be considered final and appealable regardless of whether the attorney's fees could be characterized as part of "the merits relief," the Court emphasized that the application of Rule 59(e) and F.R.A.P. 4(a)(4) must be governed by the practical, traditional principles of finality rather than by a characterization of the post-judgment relief.

> A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise the decisions embodied in the order. [cit.] We have all but held that an attorney's fees determination fits this description. In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982), we held that a request for attorney's fees under 42 U.S.C. § 1988 is not a motion "to alter or amend the judgment" within the meaning of Federal Rule of Civil Procedure 59(e) because it does not seek "reconsideration of matters properly encompassed in a decision on the merits." . . .
>
> The foregoing discussion is ultimately question-begging, however, since it assumes that the order to which the fee issue was collateral *was* an order ending litigation on the merits. If one were to regard the demand for attorney's fees as *itself* part of the merits, the analysis would not apply . . . .
>
> . . . Now that we are squarely confronted with the question, however, we conclude that the § 1291 effect of an unresolved issue of attorney's fees for the litigation at hand should not turn upon the characterization of those fees by the statute or decisional law that authorizes them.

> We have said elsewhere that "[t]he considerations that determine finality are not abstractions but have reference to very real interests—not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system." [cit.] Indeed, in the context of the finality provision governing appealability of matters from state courts to this Court, 28 U.S.C. § 1257, we have been willing in effect to split the "merits," regarding a claim for an accounting to be sufficiently "dissociated" from a related claim for delivery of physical property that "[i]n effect, such a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is *independent of, and unaffected by,* another litigation with which it happens to be entangled." *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 126, 65 S.Ct. 1475, 1479, 89 L.Ed. 2092 (1945). This practical approach to the matter suggests that what is of importance here is not preservation of conceptual consistency in the status of a particular fee authorization as "merits" or "nonmerits" but rather preservation of operational consistency and predictability in the overall application of § 1291.

Budinich, supra, 108 S.Ct. 1720-1721 (emphasis added).

Thus, *Budinich* shifted the focus of analysis under F.R.A.P. 4(a)(4) and Rule 59(e) from the "merits" to the traditional, practical approach which looks to whether a decision which effectively disposes of the litigation is "independent of and unaffected by" the subsequent proceedings. Moreover, *Budinich* reiterated the *White* analysis insofar as the *White* analysis preserves "operational consistency and predictability in the overall application of § 1291." *Id.* In fact, the "collateral" analysis in *White*

provides a very practical approach to the determination of whether a post-judgment motion falls within Rule 59(e) for purposes of appeal which is totally consistent with the practical, traditional approach espoused by *Budinich*. Like the traditional approach, *White's* collateral analysis looks to whether the motion seeks "to correct an error" in or otherwise to "change" what has already been decided.

In sum, the approach espoused by this Court in *Budinich, League of Women Voters, Buchanan,* and *White* for determining whether a post-judgment proceeding falls within the scope of F.R.A.P. 4(a)(4) and Rule 59(e) is consistent with the practical, traditional principles of finality found throughout federal practice and procedure. These principles establish that where a subsequent proceeding is separable or collateral so that it could not change what has already been decided, it will have no effect on the finality and appealability of the prior judgment regardless of whether it may relate to "merits."

C. The Eleventh Circuit Erred In Holding That The Osternecks' Request For Prejudgment Interest Is A Rule 59(e) Motion Which Suspended The Finality And Appealability Of The January 30 Judgment.

The Osternecks properly filed their notice of appeal from the January 30 judgment on March 1, 1985. The January 30, 1985 judgment, when entered, was a final and appealable judgment under § 1291. The judgment was entered on a jury verdict upon trial of all of the Osternecks' remaining claims against all of the parties. (J.A. 6). The judgment adjudicated not only liability as to all parties, but also the compensatory relief awarded by the jury on the merits of all the claims. (J.A. 6). The judgment also awarded costs to the prevailing parties and post-judgment interest from the date of the judgment pursuant to 28 U.S.C. § 1961. (J.A. 6).

Moreover, the judgment was entered on a separate document pursuant to F.R.Civ.P. 58 and docketed pursuant to F.R.Civ.P 79(a). (J.A. 6). "The sole purpose of the separate document requirement, which was added to Rule 58 in 1963, was to clarify when the time for appeal . . . begins to run." *Bankers Trust Co. v. Mallis,* 435 U.S. 381, 384 (1978). *See also Exchange National Bank of Chicago, supra,* 763 F.2d at 290 (filing of judgment on separate document notifies parties that the judgment is final). A "'judgment' for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a 'final decision' as that term is used in 28 U.S.C. § 1291 [U.S.C.S. § 1291]. Federal Rule of Civil Procedure 54(a), for example, provides that 'judgment, as used in these rules includes a decree in any order from which an appeal lies.'" *Bankers Trust Co., supra,* at 384, n. 4. *See also* F.R.A.P. 4(a)(6) (a judgment is entered for purposes of appeal when it is entered in compliance with Rules 58 and 79(a)). Entry and docketing of the separate judgment in accordance with Rules 58 and 79(a), therefore, established that the judgment was final and that the time for appeal began to run from its entry on January 30, 1985.

The trial court's reservation of the issue of prejudgment interest did not affect the finality of the judgment under § 1291 because the remaining issue of prejudgment interest was entirely separable and could not change the rights which were established in the January 30, 1985 judgment. In fact, the trial judge expressly determined

that the issue of prejudgment interest was a "separate" issue, and immediately thereafter directed the clerk to enter final judgment "as soon as possible." (J.A. 5). The judgment, therefore, would qualify as final under Rule 54(b) as well as general principles of finality under § 1291.

Furthermore, the Osternecks' motion for prejudgment interest was not a Rule 59(e) motion which would suspend the finality of the judgment under F.R.A.P. 4(a)(4). The Osternecks' motion for prejudgment interest, unlike the *Boaz* motion, did not ask the District Court to "correct errors in" or "change" what had already been decided. In contrast to the *Boaz* type motion which sought a modification of the prior decree, the Osternecks' motion was substantially identical to the post-judgment motions in *White, supra, League of Women Voters, supra, Buchanan, supra,* and in *Budinich, supra. See also Sprague v. Ticonic National Bank*, 307 U.S. 161, 170 (1939) (holding that a petition in equity for attorney's fees is "an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree."). Like those motions, the Osternecks' motion for discretionary prejudgment interest was only an independent proceeding which sought supplemental relief which was due because of the judgment and not a request for modification of anything that had been established by the January 30 judgment.[2] In fact, the award of prejudgment interest

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[2] Like the equitable attorneys fees discussed in *Sprague v. Ticonic Nat. Bank, supra,* the award of prejudgment interest in the present case was not provided by statute, but was independently based on the equitable powers of the federal district courts. *See Blau v. Lehman,* 368 U.S. 403 (1962); *Wolf v. Frank,* 477 F.2d 467 (5th Cir. 1973).

and the amended judgment expressly provided that all the provisions of the original judgment remain intact.

As pointed out by the Ninth Circuit in *Jenkins v. Whittaker Corp.*, 785 F.2d 720 (9th Cir. 1986), cert. den. — U.S. —, 107 S.Ct. 324 (1986), *a post-judgment motion for prejudgment interest does not ask the court to reconsider or correct its own mistakes because the court has not previously considered or decided the issue.*

> Such a prejudgment interest motion does not ask the court to reconsider or correct its own mistakes, because the court has not previously considered or decided the issue. The motion addresses an issue collateral to the main cause of action, requiring an inquiry unrelated to the merits that cannot be made until the moving party has "prevailed" on the merits. Prejudgment interest compensates not for the *injury* giving rise to the action but for the *delay* between injury and judgment. [cit.] Both attorney's fees and prejudgment interest seek what is due because of the judgment, the former in terms of money expended, the later in terms of time.

Jenkins, supra, at 737 (emphasis original).

The Ninth Circuit's well-reasoned opinion in *Jenkins* demonstrates that the Eleventh Circuit's decision cannot withstand scrutiny. The Eleventh Circuit stated that its decision was influenced by "the other circuit courts of appeals . . . [which] have uniformly concluded that a motion for discretionary prejudgment interest must be filed pursuant to Rule 59(e)." *Osterneck v. E.T. Barwick Industries, Inc.*, 825 F.2d 1521, 1525 (11th Cir. 1987). The *Jenkins case*, however, established that the circuit courts have not uniformly concluded that a motion for discretionary prejudgment interest is a 59(e) motion. Indeed, in finding that a motion for prejudgment interest is not a Rule 59(e)

motion, *Jenkins* convincingly distinguished cases from other jurisdictions, including the cases relied on by the Eleventh Circuit. *Jenkins* correctly pointed out that the pre-*White* cases have no precedential value because they were decided before the Supreme Court clarified the scope of Rule 59(e). *Jenkins, supra,* at 738, n.43. In addition, *Jenkins* pointed out that cases decided immediately after *White* which did not consider *White's* analysis in determining whether a motion for prejudgment interest is a Rule 59(e) motion are likewise not decisive of the issue even though they may have acknowledged the *White* decision with regard to attorney's fees. *Id.* Such cases are flawed because they rely blindly on pre-*White* cases in holding that prejudgment interest motions are 59(e) motions without considering the *White* definition of Rule 59(e) or the legislative history behind the rule. Such cases, therefore, cannot control on this issue in light of the decisions of this Court and the legislative history which instruct that Rule 59(e) should apply only to motions which seek to correct something that has already been decided and not to motions seeking additional, collateral relief.

The *Jenkins* decision also demonstrates that the Eleventh Circuit's second rationale for finding that a motion for prejudgment interest is a Rule 59(e) motion must fail. Citing *Norte & Co. v. Huffines,* 416 F.2d 1189, 1191 (2d Cir. 1969), the Eleventh Circuit decided that the Osternecks' reliance on *White* was misplaced because "prejudgment interest is compensation which directly stems from the injury giving rise to the action." *Osterneck, supra,* at 1526. As *Jenkins* points out, however, the mere fact that

prejudgment interest compensates the plaintiff does not mean that the question of prejudgment interest is a substantive issue relating to the merits of the main cause of action.

> Prejudgment interest compensates not for the *injury* giving rise to the action, but for the *delay* between injury and judgment. [cit.] Both attorney's fees and prejudgment interest seek what is due because of the judgment, the former in terms of money expended, the latter in terms of time.

Jenkins, supra, at 737 (emphasis original).

Of course, prejudgment interest constitues compensatory damages, just as the award of attorney's fees compensates a prevailing party for damages which would not have been suffered had the defendant not engaged in unlawful conduct. Prejudgment interest compensates, however, not for the injury giving rise to the action, but for the delay between the injury and the judgment. Thus, although prejudgment interest is considered compensatory, it "does not form the basis of the action, but is an incident to the recovery of the principal," and is only demanded "in respect of the detention" of the principal claim. *Stewart v. Barnes,* 153 U.S. 456, 462, 464 (1894).

Moreover, *Norte & Co., supra,* which was relied on by the Eleventh Circuit for the proposition that interest is compensation which directly stems from the injury giving rise to the action, does not hold that prejudgment interest relates to the merits of the action. Rather, *Norte & Company* merely held that prejudgment interest constitutes compensatory damages as opposed to punitive damages. Indeed, in its order granting the motion for pre-

judgment interest, the District Court cited *Norte & Co.* for precisely this point—that prejudgment interest compensates the plaintiff for the *delay* between recovery and the wrongdoing and is not meant to punish the defendant based on the merits of the plaintiff's claims. (J.A. 41).

Ultimately, however, the Eleventh Circuit's reliance on *Norte & Co.* and on such other cases as *CIT Corp. v. Nelson,* 743 F.2d 774, 775 (11th Cir. 1984), in support of its conclusion that the Osternecks' motion for prejudgment interest was a Rule 59(e) motion is erroneous because this question cannot be determined based on a characterization of prejudgment interest as "merits" or "non-merits" relief. Indeed, *Budinich,* in effect, rejected the very line of cases relied on by the Eleventh Circuit in its attempt to distinguish the Osternecks' motion for prejudgment interest from the type of motion encountered in *White. Budinich, supra,* 108 S.Ct. at 1721. As made clear by *Budinich, supra,* it does not matter whether the relief sought involves "merits." Rather, what is important is the "preservation of operational consistency and predictability in the overall application of § 1291." *Id.* Such operational consistency is found in the practical, traditional approach which looks to whether a decision which effectively disposes of the litigation is "independent of and unaffected by" the subsequent proceedings. *Id.*

Thus, *regardless* of whether prejudgment interest is considered to relate to the merits of the action, Rule 59(e) is not applicable to the Osternecks' motion for prejudgment interest because the Osternecks' motion did not request a change in what had already been decided. The motion merely requested new relief, sought as a result

of the judgment entered on the jury's determination of the merits. *See Budinich,* 108 S.Ct. at 1721; *Gordon v. Heimann,* 715 F.2d 531, 538, n.7 (11th Cir. 1983) ("F.R. Civ.P. 59(e) *is* applicable for the correcting of a mistake, but is *not* applicable for a claim for new substantive relief." (emphasis original)).

The Eleventh Circuit adopted two additional arguments in its opinion which have similarly been rejected by this Court. The Eleventh Circuit found that it was justified in treating the Osternecks' motion as a Rule 59(e) motion in order to avoid "the piecemeal appeal of non-final substantive judgments rendered by the District Court." *Osterneck,* 825 F.2d at 1526. This Court, however, rejected this rationale as a basis for construing a motion within the scope of 59(e) in *White. White,* 455 U.S. at 452-453. Instead, this Court found that the discretion of the district court will take care of the problem of untimely post-judgment motions which result in piecemeal appeals. *Id.* at 454. The concern for avoiding piecemeal appeals, therefore, does not justify construing the Osternecks' motion as a Rule 59(e) motion. Moreover, as a practical matter in the present case there would have been no danger of "piecemeal appeals" because the Eleventh Circuit held that the *merits* as well as the jurisdictional questions of the Osternecks' March 1, 1985 appeal should be consolidated with the July 1985 appeals for purposes of the briefing schedule and oral argument. (J.A. 48). *See also Brown Shoe v. United States, supra,* 370 U.S. at 310 (rejecting fear of piecemeal appeals where fear has no support in history).

The Eleventh Circuit also relied on the "amended judgment" label of the second judgment as a justification for declining jurisdiction. *Osterneck, supra,* at 1528, n.11. It is well-established, however, that an inaccurate label does not determine the time for filing an appeal. *See, e.g. Buchanan, supra,* at 1132; *Minneapolis-Honeywell, supra,* at 211; *Alimenta (U.S.A.), Inc. v. Anheuser-Busch,* 803 F.2d 1160, 1162-63 (11th Cir. 1986).

Thus, the Eleventh Circuit opinion is erroneous in many respects. It is erroneous because it did not consider the purpose and scope of Rule 59(e) as set forth in legislative history and decisions of this Court. It is erroneous because it blindly relied on cases which ignored the legislative history of and construction of Rule 59(e) adopted by this Court. It is erroneous because it relied on cases which were effectively rejected by this Court in *Budinich.* It is erroneous because it is based on technical labels rather than a practical, functional analysis in accordance with well-established principles of finality and appealability. For these reasons, the decision of the Eleventh Circuit in this case must be reversed.

II. The Eleventh Circuit's Dismissal Of The March 1, 1985 Appeal Should Be Reversed Under The "Unique Circumstances" Doctrine Even If This Court Were To Construe The Osternecks' Motion For Prejudgment Interest As A Rule 59(e) Motion.

Under the "unique circumstances" doctrine, and appeal should not be dismissed as untimely where the appellant relied on the statements or actions of the District Court in determining when to file a notice of appeal. *See Thompson v. Immigration and Naturalization Service,*

375 U.S. 384 (1964); *Wolfsohn v. Hankin,* 376 U.S. 203 (1964); *Harris Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215 (1962); *Butler v. Coral Volkswagen, Inc.,* 804 F.2d 612 (11th Cir. 1986); *Webb v. Dept. of Health and Human Serv.,* 696 F.2d 101, 105 (D.C. Cir. 1982); *Needham v. White Laboratories, Inc.,* 639 F.2d 394 (7th Cir. 1981); *Lieberman v. Gulf Oil Corp.,* 315 F.2d 403 (2nd Cir. 1963).

The Osternecks relied on the statements and actions of the District Court in determining when to file their notice of appeal in this case. For example, the Osternecks' determination that the January 30, 1985 judgment was the final judgment on the merits for purposes of filing a notice of appeal was the result of the District Court's repeated characterization of the January 30, 1985 judgment as the *final* judgment notwithstanding the pendency of the motion for prejudgment interest, (J.A. 44) and of the District Court's characterization of the motion for prejudgment interest as an issue "separate" from the judgment on the merits which was entered on January 30, 1985. (J.A. 4). The District Court's express designation of the prejudgment interest issue as a separate issue, its direction to the clerk to enter the judgment "as soon as possible" notwithstanding the reservation of the prejudgment interest issue, and the entry and docketing of the judgment pursuant to F.R.Civ.P. 58 and F.R.Civ.P. 79(a) sent a clear signal to the parties that the judgment was to be considered final for purposes of appeal notwithstanding the pending prejudgment interest issue. (J.A. 5).

The District Court also treated the January 30, 1985 judgment as final notwithstanding the pending motion for prejudgment interest when it denied as untimely E.T. Bar-

wick's motion for an extension of time to file a bill of costs and denied Barwick Industries' request for a stay of execution without giving bond. (J.A. 2, 35-36). Indeed, even in granting the motion for prejudgment interest, the District Court continued to refer to the January 30, judgment as the "final" judgment. (J.A. 44).

The clerk of the District Court treated the January 30, 1985 judgment as final when he charged an additional filing fee for the July 1985 notice of cross appeal from the order granting prejudgment interest, an action which was expressly incompatible with a characterization of the Osternecks' motion as a Rule 59(e) motion pursuant to F.R.A.P. 4(a)(4).

Moreover, until September 9, 1985, no party, even E & W, considered the Osternecks' motion to be a Rule 59(e) motion which would render all earlier notices of appeal ineffective. *See Osterneck, supra,* 825 F.2d at 1527, 1530. All parties filed notices of appeal from the January 30 judgment in March 1985. (R23-475-477, 482-484). Two parties stipulated that the Osternecks' March 15 notice of cross appeal was timely. (J.A. 37). E & W filed its notice of appeal from the award of costs on the January 30 judgment in June 1985 and failed to renew it after the award of prejudgment interest as would have been required if the Osternecks' motion for prejudgment interest were a Rule 59(e) motion. (R23-504). In addition, E & W affirmatively represented to the Eleventh Circuit in a brief filed April 22, 1985, which was subsequent to the time the motion for prejudgment interest was filed yet well before the time for filing a renewal notice of appeal had expired, that the January 30, 1985 judgment was the "final judgment" for purposes of appeal. (11th Cir. Rec., E & W brief filed April 22, 1985, at 7). In this brief, E & W pointed out that Defendants Talley, Keller and Barwick Industries, as well as the Plaintiffs, had all filed on March 1, 1985 "timely" notices of appeal from the "Final Judgment." *Id.* at 2-3, 7.

Because of these unique circumstances, the Eleventh Circuit erred in dismissing the Osternecks' appeal as untimely.

CONCLUSION

For the above reasons and based on the record in this case, the Petitioners respectfully request this Court to reverse the Eleventh Circuit's dismissal of the Osternecks' March 1, 1985 appeal and remand for consideration of the merits of the Osternecks' appeal against E & W.

Respectfully submitted,

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No. 87-1201

IN THE

Supreme Court of the United States

October Term, 1988

MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,
Plaintiffs-Petitioners,

v.

ERNST & WHINNEY,
Defendant-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Is a post-judgment motion filed within the ten days prescribed by Fed. R. Civ. P. 59(e), and which seeks to change the original judgment by adding discretionary prejudgment interest to the amount of plaintiffs' recovery on federal securities claims, a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e)?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners Myles Osterneck, Guy-Kenneth Osterneck, and Myles Osterneck and Guy-Kenneth Osterneck as Trustees for the Benefit of Robert Osterneck (Plaintiffs-Appellants); E. T. Barwick Industries, Inc., M. E. Kellar, B. A. Talley (Defendants-Cross Appellants); Eugene Barwick (Defendant-Appellee); and Respondent Ernst & Whinney (Defendant-Appellee).

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No. 87-1201

IN THE

Supreme Court of the United States

October Term, 1988

MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,
Plaintiffs-Petitioners,
v.
ERNST & WHINNEY,
Defendant-Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

Respondent Ernst & Whinney respectfully requests that this Court affirm the Eleventh Circuit's opinion dismissing Petitioners' appeal for lack of jurisdiction.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Osterneck v. E.T. Barwick Industries, Inc.*, 825 F.2d 1521 (11th Cir. 1987), and is set forth in the Joint Appendix at 49.

The original judgment in the district court is set forth in the Joint Appendix at 6.

The order of the district court amending the original judgment to award prejudgment interest is set forth in the Joint Appendix at 39.

The Amended Judgment is set forth in the Joint Appendix at 44.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals of the Eleventh Circuit was entered on August 31, 1987. The Eleventh Circuit denied Petitioners' Suggestion of Rehearing In Banc and Petition for Rehearing on October 19, 1987. The Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit was filed with this Court on January 15, 1988 and granted on June 6, 1988.

FEDERAL STATUTES AND RULES INVOLVED

28 U.S.C § 1291:

Final Decisions of District Courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court. . . .

Rule 59(e) of the Federal Rules of Civil Procedure:

Motion to Alter or Amend a Judgment.

A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 4(a) of the Federal Rules of Appellate Procedure:

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; . . . .

. . . .

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii)

under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

STATEMENT OF THE CASE

This securities fraud case arose out of the September 8, 1969 merger of Cavalier Bag Company ("Cavalier"), a corporation owned by Petitioners, into E.T. Barwick Industries, Inc. ("Barwick Industries"). Pursuant to the merger, Petitioners exchanged their stock in Cavalier for stock in Barwick Industries. In agreeing to the exchange, Petitioners allegedly relied on Barwick Industries' audited financial statements for the two years preceding the merger. Respondent Ernst & Whinney, the independent certified public accountants for Barwick Industries, audited those financial statements.

Nearly six years after the merger, on September 4, 1975, Petitioners filed this action alleging violations of Sections 10(b) and 20 of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78j(b), 78t), Rule 10b-5 thereunder (17 C.F.R. § 240.10b-5), and the common law of Georgia. The original complaint and the amended complaint each sought prejudgment interest as part of the recovery. (R1-1-44-45 & R7-147-44-46)

Following almost ten years of pretrial proceedings, this case went to trial in October, 1984, against Barwick Industries; E. T. Barwick, B. A. Talley and M. E. Kellar, who were directors and officers of Barwick Industries prior to or during the merger; and Ernst & Whinney. After a three and one-half month jury trial, a verdict was returned in favor of Ernst & Whinney and E. T. Barwick, individually. However, the jury found in favor of Petitioners against defendants Barwick Industries, Talley and Kellar in an amount exceeding $2.6 million as compensatory damages for their violations of federal securities laws and Georgia common law.

The original judgment was entered on January 30, 1985. (J.A. 6) The same day, the district court told the parties that "if prejudgment interest is granted it will be — the judgment can be amended." (J.A. 5) Within the ten days prescribed by Fed. R. Civ. P. 59(e), Petitioners filed their motion for prejudgment interest computed from September 8, 1969, the date of the merger. (J.A. 8) While that motion was pending, Petitioners filed a notice of appeal and two notices of cross-appeal from the January 30, 1985 Judgment. (J.A. 34)

On July 1, 1985, the district court granted Petitioners' motion and, precisely as it had indicated, ordered that the original judgment be "AMENDED" to award prejudgment interest to Petitioners. (J.A. 39) On July 9, 1985, the Court entered the "Amended Judgment," increasing by nearly $1 million the compensatory damages awarded Petitioners on their federal securities claims. (J.A. 44)

Petitioners failed to appeal from the Amended Judgment as to Respondent Ernst & Whinney. The Eleventh Circuit held that Petitioners' motion for prejudgment interest was a Rule 59(e) motion to alter or amend the original judgment, and that Petitioners' notices of appeal filed while the Rule 59(e) motion was pending had no effect. *Osterneck*, 825 F.2d at 1526; *see* Fed. R. App. P. 4(a)(4). Accordingly, the Eleventh Circuit dismissed Petitioners' appeal as to Respondent Ernst & Whinney for lack of jurisdiction.

SUMMARY OF ARGUMENT

Petitioners' post-judgment motion to add discretionary prejudgment interest to the amount of their recovery on federal securities claims constituted a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). Petitioners' motion was filed within the ten days set forth in Rule 59(e), and sought to "alter or amend the judgment" by increasing the compensatory damages awarded.

In addition to the literal language of Rule 59(e), important principles of finality require treatment of Petitioners' motion within Rule 59(e). "Finality" under 28 U.S.C. § 1291 ordinarily requires that all of the district court's decisions in a case be reviewed together in a single appeal. Rule 59(e) and Fed. R. App. P. 4(a)(4) help implement this requirement. Appellate Rule (4)(a)(4) precludes appeal until the district court has resolved a timely Rule 59(e) motion. Therefore, characterizing a post-judgment motion as within Rule 59(e) means that its resolution will be reviewed on appeal with the rest of the case. Conversely, characterizing a particular post-judgment motion as outside Rule 59(e) and the other Rules listed in Appellate Rule 4(a)(4) means that the order resolving the motion may be reviewed separately from the rest of the case. Because the district court's decision whether to award prejudgment interest fixed the amount of compensatory damages for Petitioners' claims on the merits, it needed to be reviewed with the rest of the case and is properly within Rule 59(e).

Except where required by necessity or justified by long tradition, this Court has refused to deviate from the requirement of a single appeal from all issues in the case. Orders which conclusively determine important

issues completely separate from the merits and which would be effectively unreviewable on appeal from the final judgment are accorded separate review under the "collateral order" doctrine. Costs are divorced from the judgment by the express language of Rule 58 that "[e]ntry of the judgment shall not be delayed for the taxing of costs." Orders which deal with issues historically treated as "costs" are separately reviewable under this Court's decisions in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982) (attorney's fees); *Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 1717 (1988) (attorney's fees); and *Buchanan v. Stanships, Inc.*, 108 S. Ct. 1130 (1988) (costs). Like the "collateral order" doctrine, these decisions require the order to be completely separate from the merits of the action and require strong, affirmative policy reasons to justify separate appellate review.

None of the exceptions to the requirement of a single appeal from all decisions in a case authorizes appeal from a judgment awarding compensatory damages where a request for further compensatory relief in the form of prejudgment interest is pending. Such orders are not "completely separate" from the merits of the action. They have not been addressed historically as costs, and separate suits solely for the recovery of prejudgment interest have not been recognized. Orders awarding or denying discretionary prejudgment interest are not "effectively unreviewable" on appeal from final judgment. There are no affirmative policy reasons justifying appellate review of such orders separate from the remainder of the action. Motions for the award of discretionary prejudgment interest should continue to be treated within Rule 59(e), presented within its ten-day period, and resolved in the district court before appellate review begins.

Finally, the "unique circumstances" asserted by Petitioners do not require reversal. Petitioners did not forego filing a notice of appeal due to the district court's express assurance that an untimely filing was "timely." Thus, Petitioners fail to come within the strictly limited holding in *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964).

ARGUMENT

I.

A MOTION MADE WITHIN THE TEN DAYS PRESCRIBED BY RULE 59(e), AND WHICH SEEKS TO ADD DISCRETIONARY PREJUDGMENT INTEREST TO THE COMPENSATORY DAMAGES AWARDED BY A JUDGMENT ON FEDERAL SECURITIES CLAIMS, IS A RULE 59(e) MOTION TO ALTER OR AMEND THE JUDGMENT.

The Eleventh Circuit correctly held that a post-judgment motion filed within the ten days prescribed by Rule 59(e), seeking to add discretionary prejudgment interest to the amount awarded by a judgment on federal securities claims, is a Rule 59(e) motion to alter or amend the judgment. Accordingly, under Fed. R. App. P. 4(a)(4) Petitioners' notices of appeal filed prior to the resolution of their motion had no effect. The decision of the Eleventh Circuit dismissing the appeal against Ernst & Whinney for lack of jurisdiction should be affirmed.

A. Petitioners' Motion for Prejudgment Interest Was A Motion To Alter Or Amend Within The Literal Language Of Rule 59(e).

Petitioners' request for a prejudgment interest award altering the amount of compensatory damages to which they were entitled under the initial judgment, on the understanding that if the request were granted the judgment would be "amended," is literally a "motion to alter or amend the judgment" within the express

language of Rule 59(e). The initial judgment adjudicated Petitioners' federal securities claims and fixed their entitlement to compensatory damages; the amended judgment revised that determination of the parties' rights by allowing recovery of further compensatory damages in the form of prejudgment interest. Petitioners' motion sought a "substantive alteration" of the rights adjudicated by the merits judgment (*Osterneck*, 825 F.2d at 1526), required the district court to "substantively reconsider" the judgment (*id.* at 1525), and necessarily falls within Rule 59(e).

In deeming Petitioners' motion "precisely the sort of alteration or amendment contemplated by Rule 59(e)" (*id.* at 1525), the Eleventh Circuit aligned itself with the overwhelming weight of authority applying that Rule to motions for discretionary prejudgment interest. *See, e.g., McConnell v. MEBA Medical & Benefits Plan*, 778 F.2d 521, 526 (9th Cir. 1985); *Elias v. Ford Motor Co.*, 734 F.2d 463, 466 (1st Cir. 1984); *Stern v. Shouldice*, 706 F.2d 742, 747 (6th Cir.). *cert. denied*, 464 U.S. 993 (1983); *Goodman v. Heublein, Inc.*, 682 F.2d 44, 45-46, (2d Cir. 1982); *Lee v. Joseph E. Seagram & Sons, Inc.*, 592 F.2d 39, 42 (2d Cir. 1979); *Hoffman v. Celebrezze*, 405 F.2d 833, 835-37 (8th Cir. 1969); *Spurgeon v. Delta S.S. Lines, Inc.*, 387 F. 2d 358, 359 (2d Cir. 1967); *Gray v. Dukedom Bank*, 216 F.2d 108, 109-10 (6th Cir. 1954). *But see Jenkins v. Whittaker Corp.*, 785 F.2d 720 (9th Cir.), *cert. denied*, 107 S. Ct. 324 (1986) (discussed *infra* pp. 28-29).

B. Important Principles of Finality Require Application of Rule 59(e) to Petitioners' Motion for Prejudgment Interest.

1. Federal Rule of Civil Procedure 59(e) And Federal Rule of Appellate Procedure 4(a)(4) Work Together to Implement the Finality Requirement of Section 1291 of the Judicial Code.

Section 1291 of the Judicial Code (28 U.S.C. § 1291) confers appellate jurisdiction upon the courts of appeals only from "final decisions" of the district courts. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 1717, 1720 (1988) (*quoting Catlin v. United States*, 324 U.S. 229, 233 (1945)). *Accord Berman v. United States*, 302 U.S. 211, 212-13 (1937).

This Court has recognized the central importance of the finality requirement to effective judicial administration:

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration.

Cobbledick v. United States, 309 U.S. 323, 324-25 (1940) (footnote omitted). " '[T]he final judgment rule is the dominant rule in federal appellate practice.' " *Flanagan v. United States*, 465 U.S. 259, 270 (1984) (citation omitted).

Finality ordinarily requires not only that the district court decide all issues completely, but also that its decisions be reviewed *together* in the context of a single appeal. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) ("The purpose [of 28 U.S.C. § 1291] is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results."); *Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66, 70 (2d Cir. 1973) (Friendly, J.) ("The final judgment rule is designed not merely to prevent an appeal on an *issue* concerning which the trial court has not yet made up its mind beyond possibility of change but also to eliminate the need for separate appellate consideration of different elements of a single claim.") (emphasis in original).

Federal Rule of Civil Procedure 59(e) and Federal Rule of Appellate Procedure 4(a)(4) help to implement the final judgment rule and its policy of securing complete decisions for unified appellate review. Rule 59(e) requires that motions to alter or amend a judgment be filed within ten days, the same time limitation found in Rule 50(b) (motion for judgment notwithstanding the verdict), Rule 52(b) (motion to amend findings) and Rule 59(b) (motion for new trial). These Rules ensure that all requests to the trial court for further decisions affecting a judgment are made promptly after entry of the judgment.

Under Appellate Rule 4(a)(4), where "any party" files any of the foregoing motions (including those under Rule 59) the time for appeal by "all parties" runs from entry of the order resolving the motion; a "new notice of

appeal must be filed from entry of the order;" and any previously-filed notice of appeal has "no effect." Fed. R. App. P. 4(a)(4). Where it applies, Rule 4(a)(4) nullifies a premature notice of appeal as if it had never been filed and the appellate court lacks jurisdiction to hear the case. *Griggs v. Provident Consumer Dist. Co.*, 459 U.S. 56, 59 (1982) (*citing* Fed. R. App. P. (4)(a)(4) advisory committee note to 1979 Amendment). By precluding appellate jurisdiction until the district court completely resolves all issues affecting the judgment, Appellate Rule 4(a)(4) and Civil Rule 59(e) help implement the final judgment rule and secure simultaneous review of decisions that may be reviewed together.

2. Petitioners' Motion For Prejudgment Interest Needed to Be Resolved in the District Court Before Appellate Review Began.

Because of the interplay of Rule 59(e) and Appellate Rule 4(a)(4), a decision that a particular motion is or is not within Rule 59(e) carries with it important finality consequences. To characterize a motion as within Rule 59(e) implies that the order resolving it should be reviewed together with the rest of the case. Conversely, to deem a post-judgment motion outside the careful framework of Rules 50(b), 52, and 59 means that, notwithstanding the combined review normally required by the final judgment rule, separate appellate review is permitted. *See* Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts,* 69 Cornell L. Rev. 207, 221-23 (1984). Thus, although couched in Rule 59(e) terms, the real question presented here is whether a judgment determining plaintiffs' compensatory damages (the January 30 judgment) can be appealed separately from

an adjudication of a request for additional compensatory relief on the very same claim in the form of prejudgment interest (the July 9 judgment). The final judgment rule requires a negative answer.

Until Petitioners' motion for prejudgment interest was decided, the litigation on the merits was not over and the judgment was not yet ripe for execution. The district court had not resolved fully all of the elements of the compensatory damages recoverable by the Petitioners on their securities claims, nor had it finally established the amount of that recovery. To allow appeal of a judgment before a plaintiff's entitlement to discretionary prejudgment interest is resolved by the district court would contravene the requirement of Section 1291 to effect simultaneous review of complete decisions governing all elements of a plaintiff's claim on the merits. Thus, the traditional treatment of post-judgment requests for discretionary prejudgment interest as within 59(e), and not independently appealable, is consistent with the unitary appeal requirement of the final judgment rule.

C. Petitioners' Request For Prejudgment Interest Does Not Fall Within The Narrow Exceptions To The Unified Review Required By Section 1291.

In an attempt to breathe life into their premature notices of appeal, Petitioners distort the requirements of finality. They urge that their motion for prejudgment interest was actually an "independent proceeding" (Petitioners' Brief at 28), separate from the judgment establishing other elements of compensation for the very same claim and warranting a separate appeal. Contrary to Petitioners' contention, such a view of "finality" is neither traditional nor practical.

Narrow exceptions to the requirement of a single appeal exist only where decisions are completely separate from the merits and necessity or long tradition mandate separate appellate review. A judgment on the merits while a motion for prejudgment interest is pending possesses none of these characteristics. No exception to Section 1291's requirement of unified appellate review justifies Petitioners' attempt to sever different components of compensatory damages on the very same claim.

1. This Court's Decisions Concerning Collateral Orders and Costs Fail To Support A Departure From Finality Principles In This Case.

Petitioners cite the "collateral order" doctrine developed in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) as support for deviating in this case from the requirement of a single appeal from a final judgment. In *Cohen,* however, the Court underscored the importance of unitary appellate review:

> Nor does [28 U.S.C. § 1291] permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose [of 28 U.S.C. § 1291] is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.
>
> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.

Id. at 546-47.

Thus, *Cohen* requires that (1) an order be completely separate and independent from the merits; and (2) strong, affirmative reasons mandate separate appellate review. Indeed, subsequent cases confirm that the "collateral order" doctrine allows departure from combined review of all decisions of the district court only

when the order appealed from "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action and [is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). *Accord Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1137 (1988).[1]

The Court has declined to "transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in § 1291." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985) (*quoting Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 (1981)). To the contrary, it repeatedly has interpreted Section 1291 to require one appeal of issues that may be reviewed together. *See Van Cauwenberghe v. Biard*, 108 S. Ct. 1945, 1952 (1988) ("[a]llowing appeals of interlocutory orders that involve considerations enmeshed in the merits of the dispute would waste judicial resources by requiring repetitive appellate review of substantive questions in the case"); *Stringfellow v. Concerned Neighbors In Action*, 107 S. Ct. 1177, 1183 (1987) (order granting permissive intervention but denying intervention as of right is not

[1] The Court strictly construes the "completely separate from the merits" requirement of *Cohen*. That requirement is not satisfied where resolving the asserted "collateral issue" requires assessment of evidence presented at trial. *Van Cauwenberghe v. Biard*, 108 S. Ct. 1945, 1952-53 (1988) (forum non conveniens decision not sufficiently separate or collateral for application of *Cohen* doctrine); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985) (disqualification of counsel in a civil case not sufficiently separate or collateral for application of *Cohen* doctrine); *Flanagan v. United States*, 465 U.S. 259, 264-65 (1984) (disqualification of counsel in a criminal case not sufficiently separate or collateral for application of *Cohen* doctrine).

immediately appealable because, as a party, intervenor can obtain effective review of its claims on appeal from final judgment); *DiBella v. United States*, 369 U.S. 121, 129 (1962) (rejecting interlocutory appellate consideration of preindictment suppression of evidence as authorizing "truncated presentation of the issue of admissibility"); *Parr v. United States*, 351 U.S. 513, 519 (1956) ("[t]he lack of an appeal now will not deny effective review of a claim fairly severable from the context of a larger litigious process") (citation omitted).

In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), this Court effectively imported *Cohen's* limited "collateral and independent" order analysis into the construction of Rule 59(e). *Id.* at 452 n.14. The Court found that a request by a "prevailing party" for attorney's fees under 42 U.S.C. § 1988 raised legal issues "collateral to" the main cause of action and that their award was "uniquely separable" from it. *Id.* at 451-52. Accordingly, the Court held that the request was not a "motion to alter or amend" subject to the ten-day time limit of Rule 59(e).

More recently, in *Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 1717 (1988), this Court confirmed the finality consequences of its decision in *White*. The Court held that a judgment was final and appealable despite a pending request for attorney's fees. It emphasized the traditional treatment of attorney's fees as an element of costs:

> [A] claim for attorney's fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action. At common law, attorney's fees were regarded as an element of "costs" awarded to the prevailing party (*see* 10 C. Wright,

> A. Miller & M. Kane, Federal Practice and Procedure: Civil § 2665 (1983)), which are not generally treated as part of the merits judgment, *cf.* Fed. Rule Civ. Proc. 54(d) ("[e]ntry of the judgment shall not be delayed for the taxing of costs"). . . .

Id. at 1721. *Accord Buchanan v. Stanships, Inc.*, 108 S. Ct. 1130 (1988) (prevailing party's Rule 54(d) motion for costs not within Rule 59(e)).

In both *White* and *Budinich*, the Court stressed the traditional and functional independence of attorney's fee requests from the judgment on the merits. *White*, 455 U.S. at 451-52; *Budinich*, 108 S. Ct. at 1720-22. The Court cited precedents establishing that the issue of attorney's fees is so independent of the main action as to support a separate federal action " 'solely to obtain an award of attorney's fees' " for legal work done in prior proceedings. *White*, 455 U.S. at 451 n.13 (*quoting New York Gas Light Club, Inc. v. Carey*, 447 U.S. 54, 66 (1980)); *Budinich*, 108 S. Ct. at 1720 (*citing White* and *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939) (noting fee application would support an independent lawsuit)).

Furthermore, consistent with *Cohen* and the Court's other finality decisions, the Court in *White* and *Budinich* also identified affirmative policy reasons unique to attorney's fee awards that justified their traditional treatment separately from the judgment on the merits. *White*, 455 U.S. at 453; *Budinich*, 108 S. Ct. at 1722. To have held otherwise actually would have encouraged piecemeal appellate review of fee requests; litigants who obtained interim but arguably final injunctive orders in the course of protracted civil rights litigation would have been forced to file successive requests for attorney's fees during the proceeding, lest

they be held untimely under Rule 59(e)'s ten-day time period. Moreover, the ten-day limit of Rule 59(e) threatened to deprive counsel of time necessary to negotiate private settlements of fee questions. *White*, 455 U.S. at 452-53. The Court also mentioned, but disclaimed reliance on, potential conflicts of interest associated with deferral of merits issues pending resolution by counsel of entitlement to their own fees. *White*, at 453 n.15. The *Budinich* Court recognized that these same factors were present irrespective of the source of the request for attorney's fees. *Budinich*, 108 S. Ct. at 1722.

In *Budinich*, the Court concluded that the finality of a judgment despite a pending request for attorney's fees rested upon the *general* treatment of attorney's fees as a traditional part of costs independent of the merits; and not upon the conceptual "merits" or "non-merits" character of a *particular* fee award in a particular case:

> [W]hat is of importance here is not preservation of conceptual consistency in the status of a particular fee authorization as "merits" or "non-merits," but rather preservation of operational consistency and predictability in the overall application of § 1291. This requires, we think, a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final . . . .
>
> . . . The time of appealability, having jurisdictional consequences, should above all be clear. We are not inclined to adopt a disposition that requires the merits or non-merits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known. Courts and litigants are best served by the bright-line rule, which accords with traditional understanding,

> that a decision on the merits is a "final decision" for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case.

Budinich, 108 S. Ct. at 1721-22. *Accord Van Cauwenberghe v. Biard*, 108 S. Ct. 1945, 1951 (1988) ("In fashioning a rule of appealability under § 1291, however, we look to categories of cases not to particular injustices.") (*citing Carroll v. United States*, 354 U.S. 394, 405 (1957); *United States v. MacDonald*, 435 U.S. 850, 856-58 n.6 (1978)).

2. Petitioners Fail to Justify Excluding Prejudgment Interest From Traditional Finality Analysis.

Nothing in the Court's attorney's fee/costs decisions or the "collateral order" doctrine supports the contention that an award of prejudgment interest on federal securities claims is independent of the judgment on the merits, or that such a judgment ought to be final and appealable where that aspect of plaintiff's compensatory damages remains to be determined. Requests for prejudgment interest remain an integral part of plaintiff's judgment on the merits and may not be likened to attorney's fee awards or other "collateral" orders.

Unlike attorney's fees or costs, the award of prejudgment interest is not "uniquely separable" from the decision on the merits. A plaintiff's recovery of prejudgment interest depends upon an assessment of the adequacy of plaintiff's compensation in light of facts presented at trial; it is not the "inquiry separate from the decision on the merits" associated with granting a "prevailing party" its costs or attorney's fees. *Cf. White*, 455 U.S. at

451-52. Prejudgment interest traditionally has never been deemed the proper subject of an independent action or proceeding or an element of a prevailing party's costs. Prejudgment interest is not available to whichever party prevails, but is recoverable only by a plaintiff, and only as an element of compensatory damages arising from the plaintiff's claims on the merits.[2]

In *Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66 (2d Cir. 1973), the Second Circuit squarely held that a judgment ostensibly entered under Rule 54(b) that imposed liability and awarded compensatory damages was not appealable where the amount of prejudgment interest remained to be determined. It refused to allow the district court to "sever" for appellate purposes a bank's claim for principal from its claim for prejudgment interest:

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[2] The Eleventh Circuit expressly recognized that the discretionary prejudgment interest awarded here constituted "compensation which directly stems from the injury giving rise to the action." (J.A. 57) (*quoting Norte & Co. v. Huffines*, 416 F.2d 1189, 1191 (2d Cir. 1969), *cert. denied*, 397 U.S. 989 (1970)). The district court also noted that in federal securities cases "prejudgment interest is a part of compensatory damages" to be "'tempered by an assessment of the equities'." Those "equities" are determined by factors inseparable from the merits, including the degree of personal wrongdoing on the part of the defendant and whether the award of prejudgment interest would in fact be compensatory. (J.A. 10) (citation omitted). *See, e.g., Wolf v. Frank*, 477 F.2d 467, 479 (5th Cir.), *cert. denied*, 414 U.S. 975 (1973); *City Nat'l Bank v. American Commonwealth Fin. Corp.* 608 F. Supp. 941, 943 (W.D.N.C. 1985) *aff'd*, 801 F.2d 714 (4th Cir. 1986), *cert. denied*, 107 S. Ct. 1301 (1987). Petitioners themselves urged that an award of discretionary prejudgment interest "would in fact be compensatory" and was "the only way" to make them whole. (J.A. 15-17, 21-23)

Since the same operative facts that created the right to recover principal gave rise to the right to recover interest, there was but a single claim, as would be evident if the Bank had counterclaimed only for principal and, after obtaining judgment, had endeavored to sue for prejudgment interest. *See* A.L.I., Restatement of Judgments 2d, § 61 (Tent. Draft No. 1, March, 1973). We held long ago that a district court could not endow with finality a judgment which determined the merits of all of the contentions asserted by the parties but had not yet fixed the damages sought by the prevailing ones, even though the computation would now seem to be comparatively simple, if not ministerial in nature. We see no significant distinction when the court has determined part of the damages, here the principal, but has reserved, as raising fact issues, the amount of prejudgment interest.

Id. at 69 (citations omitted) (quotation omitted). Judge Friendly's opinion for the Second Circuit in *Cinerama* presaged this Court's decisions in *White* and *Budinich*. It expressly distinguished the finality analysis traditionally accorded prejudgment interest from that potentially applicable to a pending request for attorney's fees. It stressed the collateral and independent nature of fee awards, and their dependence upon facts separate from the transaction or occurrence involved in the main claim. *Id.* at 70 n.2. The Second Circuit also found that deferring a decision on attorney's fees until after final determination of the merits on appeal afforded a better perspective for evaluating the skill and effort of counsel and the benefits thereby conferred. *Id.*

This distinction in treatment between prejudgment interest and attorney's fees was reiterated in *Garcia v. Burlington Northern R.R.*, 818 F.2d 713 (10th Cir. 1987). After noting that its decision in *Budinich*[3] required treating all attorney's fees requests as "collateral," the Tenth Circuit held:

> In contrast, prejudgment interest, if permissible, must be a part of the primary damage relief sought. Any evidence relating to prejudgment interest is available when the other issues are tried, and thus, there is no reason to delay a decision on prejudgment interest until after the merits of a case are decided. If plaintiff is entitled to any prejudgment interest, it must be as a portion of his damages.

Id. at 721.

In sum, in contrast to the traditional, analytical, and evidentiary independence from the merits of a prevailing party's request for attorney's fees, requests for prejudgment interest are inextricably bound up with the merits of the plaintiff's claims. Because prejudgment interest is an element of plaintiff's compensatory damages, an order revising a prior judgment to include prejudgment interest necessarily "implies a change" in the prior judgment. *Osterneck*, 825 F.2d at 1526. Under such circumstances, a request for prejudgment interest is squarely within Rule 59(e), and the "collateral order" analysis of attorney's fee awards employed in *White* and

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[3] *Budinich v. Becton Dickinson & Co.*, 807 F.2d 155 (10th Cir. 1986), *aff'd*, 108 S. Ct. 1717 (1988).

Budinich is wholly inapplicable.[4]

Even if requests for prejudgment interest could be viewed somehow as completely separate from the merits, Petitioners fail to present any affirmative reason why such requests *should* be divorced for purposes of appeal from other elements of compensatory relief. They do not contend that deferring final judgment to allow simultaneous review of all decisions affecting a plaintiff's compensatory relief on the merits erodes any important rights or renders any issue "effectively unreviewable." *Gulfstream*, 108 S. Ct. at 1137. Nor do they point to any practical need for separate review of such requests or any long tradition supporting such treatment. Under such circumstances, there is no basis for permitting appeal of discretionary prejudgment interest awards apart from the rest of the case.

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[4] Petitioners also contend, without supporting authority or explanation, that the January 30, 1985 judgment "would qualify as final under Rule 54(b) . . . ." Petitioners' Brief at 28. However, that Rule requires that the district court make an express determination that "there is no just cause for delay." *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7-10 (1980); *DiBella v. United States*, 369 U.S. 121, 126 (1962); *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir.), *cert. denied*, 107 S. Ct. 3266 (1987); *In re Yarn Processing Patent Validity Litig.*, 680 F.2d 1338 (11th Cir. 1982) (district court *must* enter certification for Rule 54(b) to be applicable). Here, Petitioners did not request such a certification (or even mention Rule 54(b) in the trial court), and the district judge did not make the express finding. Moreover, existing Rule 54(b) decisions contradict the notion that Rule 54(b) could allow separate appellate treatment of various elements of damages arising from the same claim. *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 742 (1976); *International Controls Corp. v. Vesco*, 535 F.2d 742 (2d Cir. 1976), *cert. denied*, 434 U.S. 1014 (1978); *Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66, 69 (2d Cir. 1973).

Accordingly, the Court should not disturb the traditional and settled treatment of such motions within Rule 59(e).[5]

D. Petitioners' Proposed "Finality" Test Ignores Traditional Finality Principles And Would Eviscerate Predictable And Consistent Application Of Section 1291.

Unable to satisfy the requirements of Section 1291, Petitioners instead announce their own principle of "finality," label it "traditional," and ask this Court to embrace it. They urge that any pending motion that does not "seek to change any rights which had been

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[5] The "finality" cases cited at pp. 14 - 15 of Petitioners' Brief support neither the broad principles for which they are cited nor the result Petitioners seek. Three dealt with finality of appellate court decisions under provisions different from Section 1291. *FTC v. Minneapolis-Honeywell Reg. Co.*, 344 U.S. 206 (1952); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945); *Department of Banking v. Pink*, 317 U.S. 264 (1942). Two involved appeals expressly certified for separate review under Fed. R. Civ. P. 54(b). *In re Flight Trans. Corp. Sec.*, 825 F.2d 1249, 1251 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1113 (1988); *Exchange Nat'l Bank v. Daniels*, 763 F.2d 286 (7th Cir. 1985). Another was expressly limited to its facts and would now fall within the provisions of Fed. R. Civ. P. 54(b). *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 512 (1950). Two cases involved issues which, in the absence of immediate review, would have been unreviewable for a number of years. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). Finally, *Mitchell v. Forsyth*, 472 U.S. 511 (1985), involved the "collateral order" doctrine distinguished above. Not one of Petitioners' "finality" cases supports the contention that a judgment awarding compensatory relief on a claim should be appealable before the district court determines a request for prejudgment interest on the very same claim.

established by the judgment" does not suspend its finality. Petitioners' Brief at 17. Application of this proposed test would not change the result here. The amended judgment changed the rights established by the initial judgment by awarding nearly $1 million in additional compensatory damages. Hence, Petitioners fail their own proposed test. *See supra* pp. 10-11.

In any event, Petitioners' proposed test clashes with this Court's interpretation of Section 1291. Their test would render independently appealable any interim decision by a district court that would not be affected by further proceedings. For example, partial summary judgment establishing liability alone could qualify as final and appealable; a subsequent award of damages would be deemed "collateral" as entailing no change in the rights established by the judgment on liability and granting only what was due "because of" it. Such piecemeal approaches to "finality" are, of course, prohibited by 28 U.S.C. § 1291. *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976) (judgment establishing liability that did not also determine entitlement to damages or other relief held not "final") ("where assessment damages or awarding of other relief remains to be resolved [such judgments] have never been considered to be 'final' within the meaning of 28 U.S.C. § 1291"); *Taylor v. Board of Educ.*, 288 F.2d 600, 602 (2d Cir. 1961) ("An order adjudging liability but leaving the quantum of relief still to be determined has been a classic example of non-finality from the time of Chief Justice Marshall to our own.") (citations omitted).

Contrary to Petitioners' contention and the decision in *Jenkins v. Whittaker Corp.*, 785 F.2d 720 (9th Cir.), *cert. denied*, 107 S. Ct. 324 (1986), this Court's observation in *White* that the attorney's fee request before it sought what was due "because of" the judgment has no

talismanic significance. The Civil Rights Statute in *White* awarded attorney's fees only to a "prevailing party." 42 U.S.C. § 1988. The fee award was due "because of" the judgment only in the sense that the judgment satisfied the statutory prerequisite by identifying the "prevailing party." A "prevailing party" is entitled to an award of costs "because of" the judgment in the same way. *Buchanan v. Stanships, Inc.*, 108 S. Ct. 1130 (1988). Nothing in *White* or *Buchanan* supports using a "because of" test outside the "prevailing party" context to differentiate among elements of compensatory relief in the main proceeding on the merits. A plaintiff does not need to establish that it has previously "prevailed" to recover prejudgment interest; a plaintiff recovers prejudgment interest, if at all, in the course of "prevailing."

Petitioners attempt to confine their proposed test only to orders "effectively terminating the litigation." Petitioners' Brief at 23-24. That does not improve it, but only makes it circular. As this Court recently noted, to make finality turn upon whether an order is "an order ending litigation" is "ultimately question-begging . . . ." *Budinich*, 108 S. Ct. at 1720-21.

Petitioners' proposed test is flawed because it would permit piecemeal appeals without addressing whether necessity or tradition require separate review. By allowing separate appeals from rulings on different elements of compensatory relief on the very same claim, Petitioners' test fails to secure a single appeal of what effectively may be reviewed together. This so-called "finality" test would create results inconsistent with traditional principles of finality and destroy "operational consistency and predictability in the overall application of § 1291." *Budinich*, 108 S. Ct. at 1721.

To characterize a post-judgment motion seeking re-

lief on the merits as outside Rule 59(e) based solely upon whether the trial court has previously considered it would also upset the careful framework of specific post-judgment provisions of the Federal Rules of Civil Procedure. Once judgment is entered, the ten-day time limit of Rule 59(e) requires prompt filing of any further requests for relief affecting the judgment. Motions seeking to alter the compensatory relief already awarded by a judgment should not be placed outside Rule 59(e). That would remove the ten-day limit and render the parties uncertain as to when a judgment already entered could be treated as fully resolved by the district court. Such results conflict with cases recognizing that post-judgment motions for further relief on claims resolved by a judgment are within Rule 59(e) and untimely unless raised within its ten-day period. *See, e.g., McConnell v. MEBA Medical & Benefits Plan*, 778 F.2d 521 (9th Cir. 1985) (motion seeking prejudgment interest at rate greater than that provided by amended judgment, and motion seeking punitive damages, both of which were filed nearly one year after entry of amended judgment, held within Rule 59(e) and thus untimely).

Particularly substantial and unnecessary burdens would accompany a decision that pending prejudgment interest motions are outside Rule 59(e) and separately appealable from supposedly "final" judgments not addressing such compensatory relief. The merits-oriented factors pervading awards of prejudgment interest require review of such issues together with the appeal on the merits. *See supra* note 2. If Petitioners' argument were accepted, consolidation of appeals would be necessary simply to put together what had been taken apart needlessly. Without Rule 59(e)'s ten-day time limit, there would be no assurance that all issues affecting the

plaintiff's compensation on the merits would be raised promptly in the district court or that consolidated appeals could proceed in a timely or efficient manner. In the meantime, simultaneous jurisdiction in the district court and court of appeals over different aspects of compensatory damages on the same claim would contravene a key purpose of Fed. R. App. P. 4(a)(4). *See supra* p.14.

This case presents a clear opportunity for this Court to ensure that Rule 59(e) and Appellate Rule 4(a)(4) are applied consistently to achieve prompt resolution and unified appeal of issues which should be decided together. The Court has already established that attorney's fees and other costs, divorced from the merits by tradition and by Rule 58, are outside Rule 59(e). Here, the Court can confirm placement of the opposite pole by holding that motions for relief traditionally encompassed within the merits remain within Rule 59(e).

In sum, requests for prejudgment interest require no appellate review separate from that afforded other elements of compensatory relief. They necessarily imply a change in any prior judgment fixing the compensation awarded to plaintiff on the merits. They are in no sense collateral to the merits, and are squarely within Rule 59(e). Accordingly, Petitioners' premature notices of appeal filed prior to entry of the amended judgment were ineffective under Fed. R. App. 4(a)(4), and the Eleventh Circuit properly dismissed the appeal as to Ernst & Whinney.

II.

THE UNIQUE EQUITABLE CIRCUMSTANCES PRESENTED IN *THOMPSON v. IMMIGRATION AND NATURALIZATION SERVICE* DO NOT REQUIRE REVERSAL.

Petitioners also urge that the "unique circumstances" of *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964) require reversal. Neither the rule nor the rationale of *Thompson* is applicable, as the record below and Petitioners' own acts demonstrate.

In *Thompson*, a petitioner served a motion for new trial within ten days after receiving notice of entry of the judgment, but twelve days after the judgment was entered. The "trial court specifically declared that 'a motion for a new trial' was made 'in ample time.' " *Thompson*, 375 U.S. at 384. The petitioner relied upon the court's statement and did not appeal from the original judgment, but did timely appeal from denial of his motion for a new trial. Faced with these facts, this Court held that the appeal was timely. Under the "unique circumstances" exception, "an appellate court may and should hear an appeal even though it is not timely, if the appellant reasonably relied on an erroneous statement of the district court that the appeal . . . was timely, and the appeal would have been timely if the district court had been correct." *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 111 n.2 (7th Cir. 1985).

Petitioners repeatedly refer to district court "characterizations" of the January 30, 1985 judgment as final as allegedly having misled them as to the timeliness of their appeal. However, as Petitioners' themselves admit, "[i]t is well established . . . that an

inaccurate label does not determine the time for filing an appeal." Petitioners' Brief at 34. In any event, the references of the district court to the judgment as a "final" judgment are completely consistent with the result reached by the Eleventh Circuit Court of Appeals. Of necessity, a Rule 59(e) motion is made with respect to a "judgment" which, in many cases, would otherwise be "final." That is precisely why Appellate Rule 4(a)(4) was amended in 1979 to provide that the filing of a Rule 59(e) motion *suspends* the time for appeal. Fed. R. App. (4)(a)(4) advisory committee note to 1979 Amendment.

Petitioners' contention that the entry and docketing of the judgment pursuant to Fed. R. Civ. P. 58 & 79(a) "sent a clear signal to the parties that the judgment was to be considered final for purposes of appeal notwithstanding the prejudgment interest issue" ignores the plain language of those two rules. Rule 58(1) requires entry of the judgment on a general jury verdict, and Rule 79(a) requires entry of a judgment on the docket. The district court's compliance with these two Rules did not repeal Appellate Rule 4(a)(4). The only "clear signal" sent by these actions was that a general jury verdict had been returned.

The other "action" of the district court cited by Petitioners was the court's denial as untimely of E. T. Barwick's motion for extension of time to file a bill of costs and of Barwick Industries' request for stay of execution without giving bond. However, the time limits for requesting costs are set forth in Northern District of Georgia Local Rule 255-7, which provides that they must be filed within "30 days after the entry of judgment." No local rule suspends that time period where a post-judgment motion listed in Fed. R. App. P. 4(a)(4) is filed. Thus, treatment of Petitioners' motion as a Rule 59(e) motion suspending finality for appeal is

consistent with the decision that Barwick's motion for extension was untimely. Similarly, Petitioners fail to explain how a denial of a stay of execution without giving bond is affected by Fed. R. App. P. 4(a)(4).[6]

In any event, the record rebuts any assertion that Petitioners relied on any erroneous statement of the district court. Prior to the filing of Petitioners' motion for prejudgment interest, the district court expressly stated that the judgment would have to be "amended." The only vehicle provided by the Federal Rules of Civil Procedure for amending a judgment is Rule 59(e). Petitioners filed their motion within the ten days required by that Rule. The order awarding prejudgment interest was specifically termed an "amended judgment." *Osterneck*, 825 F.2d at 1528 & n.11.

In *Thompson*, the district court assured petitioner that an untimely motion was timely. Here, the district court directed Petitioners to file their motion within the proper time period, and Petitioners did so. Under these factual circumstances, the *Thompson* standard is not met.

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[6] Petitioners also contend that the *clerk* of the district court treated the judgment as final by charging an additional filing fee for the July, 1985 Notice of Cross-Appeal filed by Petitioners. None of the cases cited by Petitioners decided under *Thompson* turns upon whether a party is misled by a clerk who is in turn misled by that party's own error in captioning its Notice of Appeal as a "Cross-Appeal."

Petitioners conclude with a laundry list of actions by various other *parties* which are claimed to constitute "unique circumstances." Again, Petitioners fail to explain how these actions constitute the type of affirmative misrepresentations or misstatements *by the court* required in *Thompson*. No action by the parties was sufficient to confer jurisdiction upon the court of appeals in direct contravention of the Federal Rules of Appellate Procedure and of the subject matter jurisdiction established by the Congress of the United States.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit Court of Appeals should be affirmed.

Dated: Atlanta, Georgia
August 24, 1988

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1988

MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,

Petitioners,

v.

ERNST & WHINNEY,

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INTRODUCTION

This Court has rejected an approach to 28 U.S.C. § 1291 which depends on a characterization of a post-judgment motion as requesting "merits" or "nonmerits" relief or on an improper designation of such a motion as a motion to alter or amend the judgment. *See Budinich v. Becton Dickinson And Co.*, 108 S.Ct. 1717 (1988); *Buchanan v. Stanships, Inc.*, 108 S.Ct. 1130 (1988). In the present case, however, Ernst & Whinney ("E & W") has presented precisely the sort of analysis which has been firmly rejected by this Court. Indeed, except for the observation that Fed.R.Civ.P. 59(e), Fed.R.App.P. 4(a) and § 1291 work together, each and every one of E & W's contentions conflicts with the decisions of this Court.

I. E & W'S ANALYSIS IGNORES THE DEFINITION OF RULE 59(e) AND THE REPEATED ADMONITION THAT AN INCORRECT LABEL WILL NOT TRANSFORM A MOTION INTO A RULE 59(e) MOTION.

E & W initially argues that the Osternecks' request for prejudgment interest "on the understanding that if the request were granted the judgment would be 'amended,' is literally a 'motion to alter or amend the judgment' within the express language of Rule 59(e)." (Brief of Respondent ("E & W Brief") pp. 10-11). E & W's initial argument fails, however, because it ignores the definition of a Rule 59(e) motion and the repeated admonition that an incorrect label will not bring a motion under Rule 59(e).

Rule 59(e) by definition covers only those motions which ask the court to correct an error in or similarly revise a previous decision. *White v. New Hampshire Dept.*

of Empl. Sec., 455 U.S. 445, 450-52 (1982); *Buchanan*, 108 S.Ct. at 1131. By definition, therefore, Rule 59(e) cannot extend to the Osternecks' request for *supplemental* relief, which was *expressly deferred* by the trial court until after entry of judgment on a jury verdict on all claims, because the issue of the supplemental relief was not encompassed in or erroneously excluded from a previous decision. *See Jenkins v. Whittaker Corp.*, 785 F.2d 720 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 324 (1986).

Moreover, the record in this case and basic common sense demonstrate the fallacy in E & W's assertion that the Osternecks' "motion sought a 'substantive alteration' of the rights adjudicated by the merits judgments." (*See* E & W Brief, p. 11). The Osternecks' motion for prejudgment interest and the supporting brief show that rather than seeking to alter, revise, correct or change the amount of compensatory damages awarded by the jury and adjudicated in the merits judgment, the Osternecks *accepted* the amount of compensatory damages awarded by the jury and adjudicated in the judgment.

> *Brief in Support of Plaintiff's Motion for Award of Prejudgment Interest.*
>
> . . .
>
> The verdict and judgment . . . on the federal securities claims and the Georgia Common Law and Statutory Fraud Claims [was] in the amount of two million six-hundred thirty-two thousand, two hundred thirty-four dollars ($2,632,234.00) as compensatory damages. . . .
>
> . . . [Thus] the amount of $2,632,234.00 as compensatory damages is the amount of damages the Plaintiffs suffered on September 8, 1969.

(*See* J.A. pp. 8, 12-13). Of necessity, the request for prejudgment interest was *based* on the adjudication of compensatory damages in the verdict and judgment. (*Id.*).

Thus, the motion did not seek to revise or alter the amount adjudicated by the judgment, but only to add supplemental relief to the judgment which was due as a result of the judgment. Furthermore, because the Osternecks' motion did not seek an alteration of the rights adjudicated by the verdict and judgment, the trial court's statement that final judgment could be "amended" to reflect the addition of prejudgment interest is of no effect. *See e.g. Buchanan*, 108 S.Ct. at 1132.

The cases cited by E & W following its assertion that the Osternecks' motion was " 'precisely the sort of alteration or amendment contemplated by Rule 59(e),' " cannot remedy the flaws in E & W's argument. (*See* E & W Brief, p. 11). *Gray v. Dukedom Bank*, 216 F.2d 108 (6th Cir. 1954), did not even involve a motion for prejudgment interest and is therefore inapposite. Of the cases cited by E & W which did involve prejudgment interest, most involved postjudgment motions which sought to revise the judgment by increasing or decreasing the amount of prejudgment interest *that had already been adjudicated* in the judgment and are therefore totally consistent with the Osternecks' arguments. *See McConnell v. MEBA Medical and Benefits Plan*, 759 F.2d 1401, 1404 (9th Cir. 1985) (motion to change prejudgment interest rate almost a year after award of prejudgment interest); *Elias v. Ford Motor Co.*, 734 F.2d 463, 465-466 (1st Cir. 1984) (motion to change the rate of a previous award of prejudgment interest from 8% to 12%); *Hoffman v. Celebrezze*, 405 F.2d 833, 834-835 (8th Cir. 1969) (motion to delete previously

awarded prejudgment interest); *Spurgeon v. Delta Steam Ship Lines, Inc.*, 387 F.2d 358, 359 (2d Cir. 1967) (prejudgment interest was expressly included in prior judgment).

The remaining cases cited by E & W cannot determine the question under review because they conflict with this Court's clarification of the scope of Rule 59(e) in *White*. *See Stern v. Shouldice*, 706 F.2d 742, 747 (6th Cir. 1983); *Goodman v. Heublein, Inc.*, 682 F.2d 44, 45 (2d Cir. 1982); *Lee v. Joseph E. Seagram & Sons, Inc.* 592 F.2d 39, 42 (2d Cir. 1979). Moreover, if these cases had analyzed the pre-*White* cases on which they blindly relied, they would have found that Rule 59(e) controlled the motions under review because the motions sought to correct an error encompassed in the judgment and not because they happened to involve prejudgment interest. For example, *Stern* cited *Scola v. Boat Frances R., Inc.*, 618 F.2d 147 (1st Cir. 1980), for its assertion that "if granting prejudgment interest is discretionary, the judgment must be amended pursuant to F.R.C.P. 59." *Stern*, at 747. *Scola*, however, merely held that a motion to *delete* prejudgment interest which had been *erroneously* included in a judgment should be brought under Rule 59(e) because it seeks to correct a previously entered decision of law. *Scola*, 618 F.2d at 153. Indeed, *Scola* went on to explain that not all postjudgment motions raising prejudgment interest issues should be brought under Rule 59(e). *Id.*

Similarly, *Goodman v. Heublein* cited *Lee v. Joseph E. Seagram & Sons, Inc.*, as support for its categorial statement that "Rule 59(e) generally applies to motions for prejudgment interest." *Goodman*, 682 F.2d at 45. In *Lee*, however, the plaintiffs sought to add prejudgment interest to the judgment pursuant to Rule 60(a) almost two

years after judgment had been entered. In a holding that prejudgment interest could not be added at such a late date, the Second Circuit focused on the purpose of Rule 60(a). In its discussion, the Court merely noted that " 'where the failure to include interest resulted from an *error* of law, then relief may be had only by motion under Rule 59 and within its short time limits, by appeal, or by motion under 60(b).' " *Lee*, 592 F.2d at 43 (emphasis added).

The Court in *Lee* did *not* hold that a request for prejudgment interest must be brought pursuant to Rule 59(e) where the failure to include prejudgment interest in the judgment did not result from "an error of law" such as in the present case where the district court expressly deferred the issue until after entry of the judgment. As pointed out by *Jenkins*, such a motion is properly brought under Rule 7(b), the general motions rule. *Jenkins*, 785 F.2d at 738. Moreover, like *Scola*, *Lee* found that Rule 59(e) was only one of several procedures by which the plaintiff could seek to *correct an erroneous decision* to include or exclude prejudgment interest. Thus, like *Scola* and other cases cited by E & W, *Lee* is actually completely consistent with the Osternecks' arguments.

II. THE QUESTION OF WHETHER THE RESERVATION OF AN ISSUE TAINTS THE FINALITY OF A JUDGMENT ENTERED ON A JURY VERDICT ON ALL CLAIMS DOES NOT TURN ON WHETHER THE RESERVED ISSUE IS "COMPLETELY SEPARATE FROM THE MERITS."

E & W's second contention, that this Court's decisions in *White*, *Budinich*, and *Buchanan*, "require the [postjudgment] order to be completely separate from the

merits of the action," demonstrates that E & W has completely missed the point of these recent Supreme Court cases (*See* E & W Brief at 8, 15-21). *Budinich* expressly rejected the notion that the finality of a judgment under § 1291 should depend on whether the postjudgment order was completely separate from the merits. *Budinich*, 108 S.Ct. at 1720-21. As *Budinich* pointed out, an analysis which focuses on whether the postjudgment order was "completely separate" from the merits is not functional. *Id.*

Likewise, neither *White* nor *Buchanan* held that the finality and reviewability of a judgment depends on whether a pending postjudgment motion seeks relief which is "completely separate" from the merits. In *White* and *Buchanan*, the Court focused on whether a postjudgment motion would involve a "reconsideration of" or "change in" what had already been established by a decision on the merits, not whether postjudgment relief which had been expressly deferred for separate consideration might also be characterized as "merits" relief. *Buchanan*, 108 S.Ct. at 1131; *White*, 455 U.S. at 450-451. While the Court did note that requests for attorney's fees and costs cannot be Rule 59(e) motions because they require an inquiry separate from the merits, the Court did *not* hold that in order to be excluded from Rule 59(e), a motion *must* require an inquiry entirely separate from the merits. *See Buchanan*, 108 S.Ct. at 1131-32; *White*, 455 U.S. at 450-452.

As shown by *Budinich* and *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 126 (1945), it is entirely possible to have two merits issues in a case which, although arising from the same facts, are collaterial and independent of

each other. *Budinich*, 108 S.Ct. at 1721. *White*, *Buchanan* and *Budinich*, therefore, cannot be interpreted as requiring a characterization of postjudgment relief as "completely separate from the merits" in order to avoid the restrictions of Rule 59(e). Rather, these cases instruct that the proper focus is whether a postjudgment motion seeks to moot or substantively revise a merits judgment entered after trial or other disposal of the underlying claims. *See Budinich*, 108 S.Ct. at 1720-22; *Buchanan*, 108 S.Ct. at 1132; *see also FCC v. League of Women Voters*, 468 U.S. 364, 373 n. 10 (1984).

E & W's attempt to "import" additional limitations into § 1291 by focusing on restrictive language in *Cobbledick v. United States*, 309 U.S. 323 (1940), and in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), also demonstrates a misunderstanding of the approach to finality under § 1291 embraced by this Court in *Budinich*. In *Cobbledick*, Justice Frankfurter noted that a general purpose of the final judgment rule is to avoid the frustration of speedy justice by piecemeal appeals. Only a few years later, however, Justice Frankfurter authored the opinion in *Radio Station WOW*, in which he observed that "even so circumscribed a legal concept as appealable finality has a penumbral area" which must be administered with a degree of flexibility. *Radio Station WOW*, 326 U.S. at 123-125. Accordingly, Justice Frankfurter concluded in *Radio Station WOW* that the appeal should be permitted from the judgment notwithstanding a subsequent proceeding involving merits because the judgment would be "unaffected" by the subsequent proceeding. *Id.* at 126.

In explaining the need for an approach to § 1291 which preserves overall operational consistency, the Court in *Budinich* looked to Justice Frankfurter's words in *Radio Station WOW*, not those expressed in *Cobbledick*. E & W's reliance on *Cobbledick* in support of its overly restrictive description of the final judgment rule, therefore, is not justified.

Likewise, E & W's repeated reliance on *Cohen* and other cases dealing with the collateral order doctrine is completely misplaced. (*See* E & W Brief, pp. 16-26). The collateral order doctrine espoused by *Cohen* "recognizes that a limited class of prejudgment orders is sufficiently important and sufficiently separate from the underlying dispute that immediate appeal should be available." *Stringfellow v. Concerned Neighbors in Action*, 107 S.Ct. 1177, 1181 (1987). To qualify under the collateral order doctrine, a prejudgment decision must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from the final judgment. *Id.*

The restrictions imposed on the collateral order doctrine, however, stem from the *pretrial* stage of the order in question. As this Court has explained:

> Pretrial appeals may cause disruption, delay and expense for the litigants; they also burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial. In addition, the finality doctrine protects the strong interest in allowing trial judges to supervise pretrial and trial procedures without undue interference.

Stringfellow, 107 S.Ct. at 1184. Because the judgment at issue in the present case is not a pretrial judgment, the *Cohen* doctrine does not control its appealability nor do the reasons for the restrictive interpretation of the *Cohen* doctrine apply.

E & W's assertion that this Court effectively "imported" the limitations of the *Cohen* analysis into the construction of Rule 59(e) is without any basis whatsoever. (*See* E & W Brief, p. 19). The *White* opinion never even refers to *Cohen* or the collateral order doctrine, much less to its restrictions. Indeed, because *White*, *Buchanan* and *Budinich* all dealt with postjudgment motions like the one in the present case, by definition neither the collateral order doctrine nor its restrictive interpretation would apply. Indeed, the Osternecks only briefly mentioned the collateral order doctrine as one of several examples of this Court's pragmatic approach to finality under § 1291.

Accordingly, E & W's attempt to resurrect the "merits" analysis which was rejected by *Budinich* must fail.

III. EVEN IF A "MERITS" ANALYSIS WERE APPROPRIATE, THE OSTERNECKS' APPEAL WAS TIMELY BECAUSE THE MOTION FOR PREJUDGMENT INTEREST RAISED AN ISSUE COLLATERAL TO THE MERITS OF THE MAIN CAUSE OF ACTION.

In *Stewart v. Barnes*, 153 U.S. 456, 462, 464 (1984), this Court articulated the general rule that discretionary prejudgment interest "does not form the basis of the action," but is only an "incident" thereto and recoverable as a result of the "detention" of the underlying damages. Although *Stewart v. Barnes* used the word "incidental" to

describe discretionary prejudgment interest rather than the word "collateral," the principle described in *Stewart* is nonetheless relevant to the issue at hand. "Incidental" and "collateral" have been used interchangeably in discussing whether a motion falls within Rule 59(e) under the *White* analysis. *See West v. Keve*, 721 F.2d 91, 95 (3rd Cir. 1983); *Bygott v. Leaseway Transport Co.*, 637 F. Supp. 1433, 1438 (E.D.Pa. 1986). *See also Swanson v. American Consumer Ind., Inc.*, 517 F.2d 555, 561 (7th Cir. 1975) (motion for attorney's fees was "incidental" to the main litigation). Accordingly, for purposes of the *White* analysis, incidental discretionary prejudgment interest must be considered to be collateral to the main cause of action, and thus beyond the scope of Rule 59(e). *See also* 57 C.J.S. *Merits*, at 1070 (defining merits as strict legal rights as contradistinguished from all matters which depend upon the discretion of the court).

The Osternecks' request for prejudgment interest was in all respects collateral to the judgment on the merits. The issue of prejudgment interest was expressly reserved by the trial judge and characterized as a "separate" proceeding which was independent of the jury verdict and judgment entered on the merits, although conducted in the same lawsuit. *Cf. White*, (attorney's fee award was collateral although granted in same lawsuit which determined the merits). The Osternecks' request for discretionary prejudgment interest accepted the underlying jury verdict and merits judgment without seeking to change, moot, revise or alter it in any way.

IV. THIS COURT DID NOT LIMIT ITS ANALYSIS IN *WHITE* AND *BUDINICH* TO "AFFIRMATIVE POLICY REASONS UNIQUE TO ATTORNEY'S FEE AWARDS."

Asserting that *White* and *Budinich* were based on "affirmative policy reasons unique to attorney's fee awards and costs," E & W suggests that the Osternecks must do more than show that their motion for prejudgment interest was separate from the merits of the underlying cause of action. (E & W Brief, pp. 19, 21, 26). E & W's attempt to impose an additional burden on the Osternecks, however, fails for several reasons.

First, *White* and *Budinich* did not limit their approach to Rule 59(e) and § 1291 to "affirmative policy reasons unique to attorney's fees awards and costs." To the contrary, *White*'s analysis was based on the definition of Rule 59(e) in general. Similarly, *Budinich* looked to general principles of finality applicable to all cases in determining the proper approach to § 1291. While *Budinich* did note the similarity of attorney's fees to costs in some cases, *Budinich* rejected a comparison of attorney's fees to costs as determinative of the issue because attorney's fees are not always equated with costs. *Budinich*, 108 S.Ct. at 1721. Instead, *Budinich* emphasized the elements of the traditional finality test in *Brown Shoe v. United States*, 370 U.S. 294 (1962); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507 (1950); and *Radio Station WOW, supra*. The reservation of an attorney's fees question will not affect the finality of a judgment on the merits because the resolution of the reserved issue will not moot, revise, or interfere with an appeal from the judgment on the merits. *Budinich*, 108 S.Ct. at 1722. The Osternecks have shown

that they meet all these requirements of the traditional finality test.

In addition, each attempt by E & W to distinguish attorney's fees from prejudgment interest for purposes of § 1291 finality fails. (*See* E & W Brief, pp. 21-22). For example, like attorney's fees, prejudgment interest has been treated as an element of the cost of litigation. Indeed, in recent proposed amendments to F.R.Civ.P. 68, the "cost-shifting" rule, the Advisory Committee specifically included prejudgment interest in the costs and expenses that must be borne pursuant to Rule 68 after an offer of settlement. *See Proposed Rules*, 102 F.R.D. 407, 432-437 (1984); 98 F.R.D. 337, 361-367 (1983). The proposed inclusion of prejudgment interest in the cost-shifting rule is intended to remedy all unnecessary costs of delay. *See* 102 F.R.D. at 433 (court shall consider the amount of additional "delay, costs, and expense" including "the interest that could have been earned"); 98 F.R.D. 362, 365 (unsuccessful offeree must pay the costs and expenses, including attorney's fees and interest). Thus, like the Ninth Circuit in *Jenkins*, the Advisory Committee on the Federal Rules has recognized that, like attorney's fees and other costs of litigation, the loss of the use of money is an expense resulting from the delay between the injury and judgment.

Moreover, this Court has emphasized that discretionary prejudgment interest has traditionally been treated as collateral relief which, like attorney's fees, does not form the basis of the underlying cause of action. *Stewart v. Barnes*, 153 U.S. at 462. The cases cited by E & W, *Garcia v. Burlington Northern Railroad Co.*, 818 F.2d 713 (10th Cir. 1987), and *Cinerama, Inc. v. Sweetmusic, S.A.*, 482 F.2d 66

(2nd Cir. 1973), do not require a different rule. In *Garcia*, prejudgment interest was erroneously excluded from the judgment after a prior request for its inclusion. *Garcia* expressly noted that the trial court did not reserve the question of prejudgment interest in that case. In addition, *Garcia* did not consider the definition of Rule 59(e) or whether a subsequent award of prejudgment interest would in any way change, moot or revise the rights adjudicated in the judgment. *Garcia*, therefore, does not control the present case. Similarly, *Cinerama* is inapposite because it was not based on *discretionary* prejudgment interest nor did it involve an appeal from a judgment entered after trial of the case on the merits.

Futhermore, attorney's fees cannot be distinguished from prejudgment interest on the basis that prejudgment interest will be awarded only to a prevailing plaintiff. Like prejudgment interest, an award of attorney's fees is frequently recoverable only by a plaintiff. *See e.g.* 15 U.S.C. § 15; 45 U.S.C. § 153(p); 46 U.S.C. § 941(c); 47 U.S.C. § 407. Nor can attorney's fees be distinguished on the ground that they are always an element of costs. At least 49 federal statutes differentiate between attorney's fees and costs. *See Marek v. Chesny*, 473 U.S. 1, 48-51 (1985) (dissenting opinion).

Likewise, E & W's characterization of prejudgment interest as "compensatory" is unavailing. Like prejudgment interest, an award of attorney's fees is "compensatory" relief designed to make the litigant whole, *Evans v. Jeff D.*, 475 U.S. 717, 730-731 (1986), observed that attorney's fees under 42 U.S.C. § 1988, as "an integral part of the remedies necessary to obtain compliance with the civil rights laws," are intended to "compensate" the civil

rights litigant. This Court similarly emphasized the compensatory nature of attorney's fees when in *Hutto v. Finney*, 437 U.S. 678, 689 n. 14 (1978), it stated that "an attorney's fees award . . . makes the prevailing party whole for expenses caused by his opponent's obstinacy."

Because attorney's fee awards are compensatory relief, a distinction between an attorney's fee award and other forms of compensatory damages is "a procedure of uncertain design and questionable validity." *Budinich v. Becton-Dickinson Co.*, 807 F.2d 155, 158 (10th Cir. 1986). As explained by *Budinich:*

> "We reject as altogether too metaphysical the distinction between fees that are 'compensation for injury' and those that are not. All awards of fees make the prevailing party better off. Whether its benefit is 'really' a way to compensate for the underlying hurt or instead a way to reduce the cost of litigation, thus making redress of the underlying hurt more likely in leaving the prevailing party with a greater net award, is a question of semantics rather than substance."

Id. Thus, E & W's repeated characterization of prejudgment interest as compensatory damages does not distinguish the Osternecks' prejudgment interest award from an attorney's fee award or render it inseparable from relief awarded by the jury on the merits of the Osternecks' securities claims.

Indeed, contrary to E & W's suggestion, in determining whether to award attorney's fees, a court must frequently review the merits and supporting evidence of the underlying claim, taking into consideration the nature of the case, its particular facts and the results achieved in the case. *Riverside v. Rivera*, 477 U.S. 561, 568 n. 3 (1986); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th

Cir. 1974). Moreover, a court will frequently review the merits of the claims in order to determine "whether or not the plaintiff's unsuccessful claims are related to the claims on which he succeeded, and whether the plaintiff achieved a level of success that makes it appropriate to award attorney's fees. . . ." *Riverside*, 477 U.S. at 568. Accordingly, E & W's attempt to distinguish prejudgment interest on the ground that "a recovery of prejudgment interest depends upon an assessment of the adequacy of Plaintiffs' compensation in light of facts presented at trial" has no merit. (*See* E & W Brief, p. 22).

Finally, E & W's attempt to distinguish prejudgment interest from attorney's fees on the ground that "the issue of attorney's fees is so independent of the main action as to support a separate federal action," like E & W's other assertions, is totally incorrect. (*See* E & W Brief, pp. 8, 20). It is established that the issue of attorney's fees is *not* so independent from the main action as to support a separate federal action. *See North Carolina Dept. of Transportation v. Crest Street Community Council, Inc.*, 107 S.Ct. 336 (1986).

As shown above, prejudment interest simply cannot be distinguished from attorney's fees for purposes of determining finality under 28 U.S.C. §1291.

V. THE OSTERNECKS' DESCRIPTION OF THE FINALITY REQUIRED BY §1291 DOES NOT "EVISCERATE" PREDICTABLE AND CONSISTENT APPLICATION OF §1291.

The Osternecks' description of §1291 finality does not "eviscerate" predictable and consistent application of §1291 because it is based on the very same authorities

cited by this Court in *Budinich* and other recent cases in describing the proper application of Rule 59(e) and the final judgment rule. *See Budinich*, 108 S.Ct. at 1720-21 (citing *Brown Shoe, Dickinson, Radio Station WOW*); *Buchanan*, 108 S.Ct. at 1132 (citing *FCC v. League of Women Voters); FCC v. League of Women Voters*, 468 U.S. at n. 10 (citing *Minneapolis-Honeywell Reg. Co.*, 344 U.S. 206 (1952) and *Department of Banking v. Pink*, 317 U.S. 264 (1942)); *Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257, 267 (1978) (citing *Department of Banking v. Pink*).

Furthermore, this test does not "render independently appealable any interim decision by a district court that would not be affected by further proceedings." (*See* E & W Brief, p. 28). The §1291 standard described by the Osternecks applies by its terms only to "an order effectively terminating the litigation," such as the final judgment entered in this case on the jury determination of all the claims. (*See* E & W Brief, p. 29). Thus, the partial summary judgment and other types of prejudgment cases cited by E & W do not support E & W's position.

In an effort to circumvent this point, E & W states that "[a]s this Court recently noted, to make finality turn upon whether an order is 'an order ending litigation' is 'ultimately question begging . . . ' *Budinich*, 108 S.Ct. at 1720-21." When the quote from *Budinich* is viewed in context, however, it becomes evident that the question begging analysis discussed and rejected by *Budinich* was an analysis based on a characterization of postjudgment relief as relating to the "*merits*," such as the one proposed by E & W in this case. *Budinich*, 108 S.Ct. at 1720-21. Thus, it is E & W's "merits" analysis that is circular.

E & W's concern that piecemeal appeals would run rampant if this Court rules in the Osternecks' favor likewise has no merit. As pointed out by *White* and *Budinich*, any threat of piecemeal appeals from this type of postjudgment proceeding would, as a practical matter, be nominal. *See Budinich*, 108 S. Ct. at 1722; *White*, 455 U.S. at 452-453.

VI. THE JANUARY JUDGMENT WAS APPEALABLE UNDER THE FINALITY STANDARDS DESCRIBED BY THE OSTERNECKS.

The prejudgment interest proceeding did not affect the finality of the January judgment under the finality standards described by the Osternecks because it did not moot or revise the rights established by the jury verdict, but only added to them without any alteration whatsoever. The compensatory nature of prejudgment interest does not mean that the award of prejudgment interest revised or altered the amount awarded by the jury. As shown above, attorney's fees also add compensatory damages yet they are not deemed to moot or revise the compensatory damages awarded by the jury or judgment. Like compensatory attorney's fees, prejudgment interest is supplemental and collateral to the compensatory damages established by the judgment.

Moreover, the January judgment meets the criteria set forth in Fed.R.Civ.P. 54(b). Judge Ward *expressly* determined that the prejudgment interest issue should be handled separately and ordered entry of the final judgment as soon as possible. (J.A. 4-5). In addition, the judgment in favor of E & W could not have been changed by any award of prejudgment interest.

VII THE UNIQUE CIRCUMSTANCES DOCTRINE IS NOT LIMITED TO RELIANCE ON AN EXPRESS STATEMENT BY THE DISTRICT COURT THAT AN APPELLANT'S NOTICE OF APPEAL WAS TIMELY.

The unique circumstances doctrine, although limited, is not as limited as E & W suggests. *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964), noted that the appellant relied on actions of his opponent as well as on statements by the district court in determining that the unique circumstances doctrine should apply. Similarly, *Needham v. White Laboratories, Inc.*, 639 F.2d 394, 398 (7th Cir. 1981), found that the appellant's reliance on representations made by the appellee supported application of the unique circumstances doctrine.

Webb v. Department of Health and Human Services, 696 F.2d 101, 106 (D.C. Cir. 1982), held that the unique circumstances doctrine should apply even though the appellant did not rely on an express statement by the district court because of the unsettled state of the law on Rule 59(e) issues. *Butler v. Coral Volkswagen, Inc.*, 804 F.2d 612, 617 (11th Cir. 1986), and *Lieberman v. Gulf Oil Corp.*, 315 F.2d 403, 406 (2nd Cir. 1963), found that the unique circumstances doctrine could be supported by misleading actions of the clerk of the district court. Thus, the "laundry list of actions by various other *parties*" and by the "*clerk*" of the district court, as well as the express statements and actions of the trial judge, support the application of the unique circumstances doctrine in this case. (*See* E & W Brief, at 34.)

CONCLUSION

For the above reasons, as well as those set forth in the Brief of Petitioners, this Court should reverse the dismissal of the Osternecks' appeal against E & W and remand for consideration of the merits.

Respectfully submitted,

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